Circuit Court for the Fourteenth Circuit reversed. Blake timely appealed to the Supreme Court of the United States.

ARGUMENT

I. Standard of review

Whether Blake's speech is protected under the First Amendment is a legal question this Court reviews *de novo*. *See Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). As the non-moving party on a motion for summary judgment, all facts must be viewed in the light most favorable to the government. *See Tolan v. Cotton*, 572 U.S. 650, 651 (2014).

II. Blake's speech is not protected by the First Amendment.

Public employees' right to free speech is not absolute. A governmental employer may "impose certain restraints on the speech of its employees," even if those restraints "would be unconstitutional if applied to the general public." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004). Like private employers, governmental employers "need a significant degree of control over their employees' words and actions," otherwise "there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

To state a First Amendment claim for retaliatory discharge, a plaintiff must show: 1) they spoke "as a citizen on a matter of public concern," 2) their "interest in speaking on a matter of public concern outweighed the government's interest in providing effective and efficient services to the public," and 3) the "speech was a substantial factor in the government's termination decision." *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 342 (4th Cir. 2017). The government concedes Blake's speech was a substantial factor in her termination and Blake was speaking as a citizen. Therefore, the only questions before this Court are a) whether Blake spoke on a matter of public concern and b) if her speech was on a matter of public concern, whether the government's interest in the restriction outweighs Blake's interest in her speech.

A. Blake's speech was not on a matter of public concern.

The First Amendment only protects public employees' speech on matters of public concern. *Connick*, 461 U.S. at 146. Speech addresses a matter of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* Speech relating to "matters only of personal interest," such as "employee grievances," is not protected by the First Amendment. *Id.* at 147, 145; *see McVey v. Va. Highlands Airport Comm'n*, 44 F. App'x 630 (4th Cir. 2002) ("Matters of public concern protected by the First Amendment do not include personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest.").

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. When considering the content, form, and context of the speech, "no factor is dispositive." *Snyder v. Phelps*, 562 U.S. 443, 454 (2011). This determination is "highly fact-specific." *Farhat v. Jopke*, 370 F.3d 580, 590 (6th Cir. 2004).

Blake's speech was a personal grievance because Blake did not highlight any wrongdoing by the Department, spoke out of anger at a perceived slight, and did not intend to inform the public about her irritations.

Free speech protections for public employees are justified because their speech can provide an "informed and definite" opinion which cultivates "informed decision-making by the electorate." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968). This justification does not hold where, as here, the public employee "did not seek to inform the public." *Connick*, 461 U.S. at 148; *see Phares v. Gustafsson*, 856 F.2d 1003, 1008 (7th Cir. 1988) (holding that a medical record technician's complaints regarding diagnosis procedures was not about matters of public concern when the employee only raised the issues through the employer's internal grievance

procedures and "did not try to expose wrongdoing or inform the public of problems within the College of Veterinary Medicine.").

The private setting of Blake's speech indicates that she had no intention of informing the public. *See, e.g.*, *Connick*, 461 U.S. at 148 (considering the location in which a questionnaire was distributed); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1188 (6th Cir. 1995) ("The fact [the government employee] was in a locker room rather than a stadium . . . support[s] the conclusion [they] did not intend to speak on a matter of public concern."). Blake's comments were made to two coworkers and a superior after the Committee meeting. R. at 9. Because of this private, informal setting Blake's comments were not a matter of public concern. *See Hartman v. Bd. of Trs. of Cmty. Coll.*, 4 F.3d 465, 472 (7th Cir. 1993) (holding a public employee's comments to a superior and coworkers about sexual harassment did not constitute a matter of public concern because of the "informal, private setting" of their conversations).

If an employee criticizes their employer out of anger at an interpersonal conflict, the employee is expressing frustration at a personal grievance, rather than discussing matters of public concern. *See, e.g.*, *Cliff v. Bd. of Sch. Comm'rs*, 42 F.3d 403, 410 (7th Cir. 1994) (holding that class sizes and gender discrimination were not matters of public concern, when a teacher criticized school policies after she received an unsatisfactory performance review); *Hellstrom v. U.S. Dep't of Veterans Affs.*, 46 F. App'x 651, 656 (2d Cir. 2002) (holding that a laboratory chief at the Veterans Administration Medical Center was not speaking on matters of public concern when he criticized the Acting Director of the VA after being confronted about the unhealthy working environment in the lab). Blake gave her remarks immediately after Samson, Buchanan, and Wilder interrupted her presentation. Though the record is silent as to the tone of her voice, it may be inferred that Blake was offended and angered by her coworkers' interruption. Because Blake's

speech was an immediate response to her coworkers' slight, it was an expression of anger at an interpersonal conflict.

The personal focus of Blake's comments also demonstrates she was discussing a personal grievance. Comments about an employee's personal feelings regarding the workplace are not protected speech. *See Kokkinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir. 1999) (holding that a police officer's discussion of his feelings towards the Chief of Police was not a matter of public concern). Blake's comments largely focused on her feelings about the workplace. For example, she complained, "I'm not sure how much longer I can tolerate this boy's club," and "I was hoping Washburn would be the exception" to male-dominated police forces. R. at 9. Since these comments focus on the workplace's personal effect on Blake, they are expressions of a personal grievance.

Mentioning the Department's lack of gender diversity did not raise Blake's otherwise personal comment to a matter of public concern. Comments are not a matter of public concern when they do not "seek to bring to light actual or potential wrongdoings" and instead "convey no information at all other than the fact that a single employee is upset with the status quo." *Connick,* 461 U.S. at 148. Blake's opinion that "the lack of gender diversity [in the Department] is appalling," does not amount to a matter of public concern, as it is not an allegation of gender discrimination. R. at 9; *see, e.g., Fletcher v. Lucent Techs. Inc.*, 207 F. App'x 135, 138 (3d Cir. 2006) (holding that a male-dominated workforce was insufficient to sustain an allegation of sex discrimination without evidence that people of differing genders were treated differently). If Blake's comment about gender diversity is speech on a matter of public concern, then every rancorous male nurse, female plumber, or male paralegal[1] could assert a viable free speech claim

[1]*See* BUREAU OF LAB. STATS., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2020), https://www.bls.gov/cps/cpsaat11.htm (finding 85.8% of paralegals, 87.4% of registered nurses, and 2.3% of plumbers are women).

for outbursts that merely reiterate the gender composition of the workforce. This is too permissive a standard. Factors external to the workplace produce single-gender-dominated workforces.[2] Therefore, male- or female-dominated workforces, in and of themselves, do not imply gender discrimination. Here, Blake's general comments about the composition on the workforce were expressing "upset" at the male-dominant "status quo" in police departments, not alleging wrongdoing. *Connick*, 461 U.S. at 148.

Even if the content of Blake's speech tangentially raised matters of public concern, the context of her speech illustrates its private nature. *Connick*, 461 U.S. at 148 n.8 ("[Speech] not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest."). Because Blake did not discuss wrongdoing on the part of the Department, spoke out of frustration at a personal grievance, and did not intend to inform the public about her irritations, her speech was not on a matter of public concern.

B. Even if Blake's speech addressed matters of public concern, the government's interest in promoting efficient public services outweighs Blake's interest in her speech.

A public employee's speech on matters of public concern is not protected if "the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern." *Pickering*, 391 U.S. at 568. Factors weighing in favor of the restriction include, "whether the statement impairs discipline by superiors or harmony among co-workers,

[2] *See* Joan M. Glamanet et al., *The Effects of Co-worker Similarity on the Emergence of Affect in Work Teams*, 21 GRP. & ORGANIZATIONAL MGMT. 192 (1996) (finding demographically similar coworkers liked and preferred to work with each other more than with coworkers who were demographically different); Youngjoo Cha, *Overwork and the Persistence of Gender Segregation in Occupation*, 27 GENDER & SOC'Y, no. 2, at 158 (2013) (finding women with familial obligation are more likely to leave male-dominated workforces).

has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1994) (citing *Pickering*, 391 U.S. at 570-73). In weighing the government employer's interests, the primary consideration is the impact of the disputed speech "on the effective functioning of the public employer's enterprise." *Rankin*, 483 U.S. at 388.

1. The government has a heightened interest in promoting efficiency of public services by curbing Blake's speech.

Blake's statements disrupted the government's effective functioning as it damaged a police department's harmony and jeopardized close working relationships.

The government has a heightened interest in regulating Blake's speech because she is a police officer. Police departments have "a more significant interest than most employers in regulating speech activities of employees" because it is necessary for them to "promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence." *Tyler v. City of Mountain Home*, 72 F.3d 568, 570 (8th Cir. 1995); *see, e.g.*, *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1293 (11th Cir. 2000) ("In a law enforcement agency, there is a heightened need for order, loyalty, morale and harmony, which affords a police department more latitude in responding to the speech of its officers than other government employers."). Since Blake was a police officer, the government has a greater interest in regulating her speech.

The government also has a greater interest in regulating Blake's speech because her speech detrimentally impacted close working relationships for which personal loyalty and confidence are necessary. Blake has a close relationship with Wilder and Buchanan because they work on the same police force and regularly rely on each other in dangerous situations. R. at 8-9; *see Kokkinis*, 185 F.3d at 845 ("[T]here is a particularly urgent need for close teamwork among those involved

in the 'high stakes' field of law enforcement.") (quoting *Breuer v. Hart*, 909 F.2d 1035, 1040 (7th Cir. 1990)). In addition, Blake, Buchanan, Wilder, and Samson had a close working relationship due to their roles on the Winter Parking Committee. The creation and successful implementation of Committee policies requires a close working relationship among members. R. at 8-9; *see Brandenburg v. Hous. Auth.*, 253 F.3d 891, 899 (6th Cir. 2001) (finding a close relationship between a housing board and an executive director where the director "implement[ed] [the Board's] directives and . . . provide[d] continuing updates regarding the status of the properties."). Blake's comments were so harmful that neither Buchanan nor Wilder felt comfortable talking to her. R. at 8-9. Therefore, these comments deteriorated their close relationship.

The government also has an interest in regulating Blake's speech because it impaired harmony among coworkers. *See Rankin*, 483 U.S. at 388. Comments which cause interpersonal conflicts between co-workers impair harmony. *See Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 980-81 (9th Cir. 1998) (holding a teacher's interest in comments about falsifying school records were outweighed by the government's interest because "the existence of a personality conflict between school employees is a relevant consideration."). Blake accused Wilder and Buchanan of being unqualified for their jobs and demonstrated clear contempt for them. R. at 9. Because of Blake's comments Buchanan and Wilder could not communicate with her and a schism formed between the coworkers. *Id.* at 9-10. This constitutes disharmony.

Even if Blake's statements did not result in actual disruption of the government's effective functioning, "substantial weight" is given "to government employers' reasonable prediction of disruption." *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion). The government need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152. Additional

weight is given to this consideration because Blake's comments took place in the workplace. R. at 9; *see Connick*, 461 U.S. at 153 ("the fact that [the public employee] . . . exercised her rights to speech at the office supports [the government's] fears that the functioning of [the] office was endangered."). Samson could reasonably conclude that Blake's continued presence on the force would result in disruption because Blake's comments had already caused tension in her relationship with two close co-workers. R. at 9-10.

2. Blake's First Amendment interests are diminished by the nature of her speech and actions.

Blake's interest is diminished because she did not pursue her allegations outside of the Committee meeting and did not have specific knowledge of gender discrimination. The First Amendment does not protect the fleeting interests of public employees. Public employees demonstrate that they do not have a significant interest in their speech when it consists entirely of a one-off comment. *See Duda v. Elder*, 7 F.4th 899, 918 (10th Cir. 2021) (An employee's interest in speech is "substantially diminished by [their] failure to pursue [their] allegations."). Because Blake abandoned her complaints, she did not have a significant interest.

Additionally, Blake's interest in her speech is diminished because she did not have specific knowledge of gender discrimination in the Department. Underlying the Court's employee-speech jurisprudence is an acknowledgment of "the importance of promoting the public's interest in receiving the *well-informed* views of government employees engaging in civic discussion." *Garcetti*, 547 U.S. at 419 (emphasis added). Public employees' speech is protected because public employees are "likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." *City of San Diego*, 543 U.S. at 82. In this case, there is no evidence that Blake has a well-informed view about gender discrimination in the Department. When public employees do not have a well-informed view, they have lessened

interest in their speech. *Compare Bennett v. Metro. Gov't*, 977 F.3d 530, 539 (6th Cir. 2020) (comparing the public employee's comments on a topic "of which she had no special insight" with cases in which public employees were "*exposing* inner workings of government organizations to the public."), *and Kokkinis*, 185 F.3d at 844 (explaining that a police officer's "basis for his knowledge of the alleged sex discrimination was minimal at best" when his knowledge was founded on another employee's allegation of sex discrimination and a prior sex discrimination case involving the accused officer), *with Cotarelo v. Vill. of Sleepy Hollow Police Dep't*, 460 F.3d 247, 250 (2d Cir. 2006) (holding that a police officer's allegation of racial discrimination was protected activity when the officer provided specific examples of discrimination and had experienced discrimination himself). Even if Blake was addressing gender discrimination, she was privy to the same information as any member of the public. Blake's only purported evidence of gender discrimination was the lack of gender diversity in the Department—information that is publicly available. As Blake was not well-informed about gender discrimination in the Department and did not pursue her allegations outside of the Committee meeting, there is a lessened interest in protecting her speech.

CONCLUSION

For the foregoing reasons, the Court should uphold the judgment of the Court of Appeals for the Fourteenth Circuit.

Applicant Details

First Name	**Zoe**
Middle Initial	**S.**
Last Name	**Rubin**
Citizenship Status	**U. S. Citizen**
Email Address	**zoe.rubin@yale.edu**
Address	**Address** Street **1451 Belmont St. NW Apt. 518** City **Washington** State/Territory **District of Columbia** Zip **20009** Country **United States**
Contact Phone Number	**9178816610**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2016**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 31, 2023**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Resnik, Judith
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Jolls, Christine
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zoe S. Rubin
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June 12, 2023

The Honorable Kiyo Matsumoto
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a recent Yale Law School graduate and a Mary A. McCarthy Fellow with Senator Richard Blumenthal's Senate Judiciary Committee staff. I write to apply for a clerkship in your chambers for the 2025-2026 term.

Please find enclosed my resume, law school transcript, and writing sample. Letters of recommendation from Professors Christine Jolls, Judith Resnik, and John Fabian Witt have been submitted separately. I would welcome the opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Zoe Rubin

Zoe Rubin

Zoe S. Rubin

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EDUCATION

YALE LAW SCHOOL, New Haven, CT J.D., May 2023

Activities: Board Member, Clinical Student Board
Volunteer, International Refugee Assistance Project
Research Assistant to Professors Christine Jolls (administrative law), Judith Resnik (prisons), and John Fabian Witt (legal history)
Policy Editor, *Yale Law & Policy Review*

Note: *Spring 2021 family care leave of absence*

YALE COLLEGE, New Haven, CT B.A., *magna cum laude,* with Distinction in History, May 2016

Select Honors: Andrew D. White Senior Essay Prize for American History
Poorvu Center Writing Contest Prize for History junior seminar paper
Gordon Grand Fellowship (awarded for yearlong postgraduate public service project)
Les Aspin International Public Service Fellowship

Internships: Democracy, Human Rights, and Labor Bureau, U.S. Department of State
International Organization for Migration (now the U.N. Migration Agency)

EXPERIENCE

SIMPSON THACHER & BARTLETT LLP, New York, NY Fall 2023

Prospective Litigation Associate. Previously worked as a summer associate (during summers 2021 and 2022) on complex commercial litigation, indigent defense, and immigration matters. Received firm's Summer Public Interest Fellowship to support summer 2022 ACLU National Prison Project work.

U.S. SENATE COMMITTEE ON THE JUDICIARY, Washington, DC Spring 2023 – Present

Law Fellow for Sen. Richard Blumenthal (D-CT). Advise on national security and court reform legislation and staff committee hearings. Sponsored by Yale's Mary A. McCarthy Public Interest Law Fellowship.

ACLU NATIONAL PRISON PROJECT, Washington, DC Winter 2022 – Summer 2022

Law Clerk. Assisted with strategic litigation and advocacy related to prison conditions and immigration detention.

U.S. SENATE COMMITTEE ON THE JUDICIARY, Washington, DC Fall 2021

Law Clerk for Senator Alex Padilla (D-CA). Wrote memoranda analyzing voting rights, IP, and immigration bills.

LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, New Haven, CT Summer 2020 – Fall 2021

Law Student Intern. Represented Disability Rights Connecticut in a federal lawsuit challenging conditions of confinement in Connecticut. Led a student team that drafted an amicus brief to the Inter-American Commission on Human Rights on the effect of felony disenfranchisement laws in the Americas. Supported a legislative advocacy campaign to end Connecticut prisons' use of solitary confinement and improve oversight.

MEDIA FREEDOM AND INFORMATION ACCESS CLINIC, New Haven, CT Winter 2020 – Fall 2020

Law Student Intern. Co-drafted a Fourth Circuit amicus brief in support of a successful challenge to a Maryland law restricting public access to criminal proceedings. Helped end speech restrictions imposed on an expert witness so that he could share important public health information and conduct related research. Authored "know-your-rights" guides for journalists in key states and advised newsgatherers during the November 2020 election.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, New York, NY Summer 2020

Labor Bureau Intern. Assisted an investigation of Amazon's treatment of worker health and safety. Conducted legal research for a team defending against a constitutional challenge to a worker protection law.

THE TOBIN PROJECT, Cambridge, MA Summer 2017 – Spring 2019

Research Analyst. Managed academic research collaborations related to law, history, and democracy.

HELP FOR DOMESTIC WORKERS, Hong Kong Fall 2016 – Spring 2017

Gordon Grand Fellow. Assisted migrant workers pursuing claims against recruitment agencies and employers.

SKILLS AND INTERESTS

Limited French and Latin proficiency. Enjoy outdoor activities, travel, and reading history and fiction.

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 11-JUN-2023

Record of: Zoe Sarah Rubin Page: 1
Issued To: Zoe Rubin
Parchment DocumentID: TWNEW5HM
Date Entered: Fall 2019

Degree Awarded : Juris Doctor 31-MAY-2023

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2019					
LAW	10001	Constitutional Law I: Group 6	4.00	CR	P. Kahn
LAW	11001	Contracts I: Section A	4.00	CR	A. Bagchi
LAW	12001	Procedure I: Section B	4.00	CR	D. Schleicher
LAW	13001	Torts and Regulation I: Sect B	4.00	CR	J. Witt
		Term Units 16.00 Cum Units 16.00			
Spring 2020					
LAW	21027	Advanced Legal Research	2.00	CR	J. Krishnaswami
LAW	21068	Antitrust	4.00	CR	G. Priest
LAW	21567	Election Law	2.00	CR	D. Spencer
LAW	21722	StatutoryInterpretRegState	3.00	CR	W. Eskridge
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	CR	D. Schulz, F. Procaccini, S. Shapiro, J. Borg C. Crain, J. Pinsof, N. Guggenberger, J. Balkin S. Baron
		Term Units 15.00 Cum Units 31.00			
Spr2020 YLS classes completed after 3/6/20 graded only on a CR/F basis due to COVID-19.					
Fall 2020					
LAW	20170	Administrative Law	4.00	H	C. Jolls
LAW	20443	Criminal Law & Administration	3.00	H	N. Gertner, F. Shen
LAW	30173	LowensteinIntl HumanRts Clinic	4.00	CR	J. Silk, R. Thoreson, H. Metcalf
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	H	D. Schulz, M. Linhorst, J. Borg, C. Crain N. Guggenberger, J. Balkin, S. Baron
		Term Units 15.00 Cum Units 46.00			
Spring 2021					
Leave of Absence					
Fall 2021					
LAW	20063	American Legal History	4.00	H	J. Witt
LAW	20222	Federal Income Taxation	4.00	H	A. Alstott
LAW	20223	FedIncomeTax:BusFinanceBasics	1.00	CR	A. Alstott
LAW	20241	Conflict of Laws:Choice of Law	2.00	H	C. Vazquez
LAW	30174	AdvLowensteinHumRtsClinic	3.00	H	J. Silk, K. Beckerle, H. Metcalf
Substantial Paper					
		Term Units 14.00 Cum Units 60.00			
Spring 2022					
LAW	21136	Employment and Labor Law	3.00	H	C. Jolls
LAW	21230	First Amendment	4.00	H	J. Balkin
LAW	21534	Liman Public Interest Workshop	2.00	CR	J. Carroll, S. Albertson, J. Driver, J. Resnik, G. Li
LAW	21710	Legal Writing II	2.00	H	N. Messing

********** CONTINUED ON PAGE 2 **********

LEG. SCHOL. YALENSIS NOVIPORT. ANNO DOM MDCCCXXXV CONDIT. 192 Years

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 11-JUN-2023

Record of: Zoe Sarah Rubin

Page: 2

Level: Professional: Law (JD)

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Institution Information continued:					
		Term Units 11.00 Cum Units 71.00			
Fall 2022					
LAW	20013	Property	4.00	H	C. Priest, P. Reidy
LAW	20366	Federal Courts	3.00	P	A. Steinman
LAW	20439	American Legal Profession	2.00	H	R. Gordon
LAW	20583	Post-Conviction Crim Procedure	3.00	H	J. Carroll
Supervised Analytic Writing					
		Term Units 12.00 Cum Units 83.00			

********** END OF TRANSCRIPT **********

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to let you know of my admiration for Zoe Rubin, whom I met when, in the spring of her second year, she joined a seminar that I co-taught called “Imprisoned: From Conception and Construction to Abolition.” Thereafter, Zoe worked as a research assistant for me. Although I have not spent as long a time working with Zoe as I have for some other students, Zoe has impressed me as unusually thoughtful, serious, and able. She writes well, researches complex issues, and offers helpful commentary on diverse materials. Given that my experiences have been very positive, I write to recommend her. From what I have seen, Zoe will be an excellent law clerk.

A recap of the bases for my assessment follows, and I will start with her classwork in the seminar. Although ungraded, we ask students during the semester to write four reaction papers to synthesize and engage with the week’s readings and to provide a frame of reference for class discussions. Zoe did a terrific job. For example, when discussing a case requiring that prison officials provide access to law, such as Bounds v. Smith, Zoe discussed the lack of a standard to make that aspiration workable. Moreover, as she discussed, Lewis v. Casey’s cutbacks made less clear what the constitutional parameters are or ought to be. As she also noted, the challenges deepen given the difficulties of compliance with the rights to counsel for criminal defendants. She also saw how decisions such as Jones v. North Carolina Prisoners’ Labor Union undercut the potential for collective action and self-help.

Zoe’s work as a research assistant involved a good deal of legal research. By way of background, I am finishing a complex book probing how polities that see themselves as committed to the rights of all people punish people. I trace forms of punishment (such as whipping, forced labor, and solitary confinement) that governments – over hundreds of years – have used. For example, after a trial that produced a record of more than 600 pages, three federal judges held in 1965 and 1967 that Arkansas could whip prisoners as “discipline;” in 1968 Judge Blackmun wrote for the Eighth Circuit that doing so was “cruel and unusual punishment.” On the other hand, under current Supreme Court doctrine, “paddling” children remains permissible.

I asked Zoe to join other students in working on a series of projects. One memorandum, co-written, was to find and analyze decisions issued after 1978, when the European Court of Human Rights decided Tyrer v. United Kingdom (that whipping violated the European Convention on Human Rights), to learn more about the international law on whipping (or caning, flogging and the like) and related forms of physical punishment. The students did an overview from diverse jurisdictions as they distinguished between decisions by international and regional tribunals, that have concluded whipping is incompatible with international law and human rights agreements, and some countries that still tolerate it.

Zoe did another memo on the many prison conditions lawsuits in Rhode Island when Anthony Travisono was the head of its corrections department. He went on to be the executive director of the American Correctional Association which, in the 1980s, became a source of accreditation for prisons. In addition, Zoe delved into the history of the Arkansas Department of Correction and produced a very helpful account of its structure under a series of statutes, beginning in 1968 when it was created. Zoe also joined in helping me figure out how much money states spend on prisons. She dug into New York’s budgets from the mid-1960s to 2020. That work required reviewing statutes, budgets, and related materials.

In short, Zoe has demonstrated to me both literacy and fluency with a wide range of materials and her ability to analyze and synthesize eclectic sources. Zoe is also focused and committed to public service and remedying the harms of criminal law enforcement. Zoe told me that the work she did with me was prompted in part by her participation in Yale’s Lowenstein Human Rights Clinic, which sought, through legislation and litigation, to end profound solitary confinement and in-cell shackling in Connecticut. She has continued that focus at the ACLU’s National Prison Project, and decided to do supervised writing on the role played by Protection & Advocacy organizations in prison conditions litigation.

In sum, Zoe is impressive and especially well versed in legal research. I hope you have an opportunity to meet her.

Sincerely,

Judith Resnik

Judith Resnik - judith.resnik@yale.edu - 203-432-1447

June 06, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to offer an enthusiastic recommendation for Zoe Rubin of the Yale Law School class of 2023, who has applied to clerk in your chambers. Zoe is already an accomplished young lawyer. She is a fellow in Senator Blumenthal's office in Washington since graduation. She has considerable experience in clinics and in summer work, and spent two years on antitrust law after magna cum laude from Yale College.

Zoe is, in short, a superb clerkship candidate. She will make a very fine law clerk. I know from first-hand experience working with her.

Zoe was assigned to my large Torts course in the fall of 2019. We don't grade first-semester students, but Zoe's exam would have earned an H if we did. In the semester thereafter Zoe served as a research assistant for me. I asked her to become a Felix Frankfurter expert, and in short order she did just that! She wrote an exhaustively-researched, twenty-page memorandum on admissions quotas for Jewish applicants at Harvard in the early twentieth century, and on Frankfurter's criticisms of the quotas. She gathered and synthesized the voluminous secondary work on Frankfurter. And that spring, when the pandemic arrived, she dove into the legal history of epidemics with me (virtually, of course). Her super smart research helped me write a last-minute lecture on the topic for my annual American Legal History course, which then became a short book later in the year.

What I need from an RA in such situations is fast, reliable, and well-written memos. The work is much like many clerkships, I imagine. And what Zoe delivered was exactly what I'd hoped for.

In the spring of 2021, Zoe enrolled in my American Legal History course, where she excelled again. I was especially taken by her creative and deeply-researched paper on the history of the nondiscrimination guarantee in the post-World War Two U.N. Charter. It's a provision that has largely been overshadowed by the U.N.'s Universal Declaration of Human Rights. I learned many new things, which is not something I can often say about student research papers.

In sum, Zoe was a wonderful student and is now a great lawyer-in-the-making. She will be a delight to work with. And she is as good a writer and researcher as they come.

If I can say more to help you come to the good decision to hire Zoe, please don't hesitate to reach out. I'm a big fan.

Very truly yours,
John Fabian Witt
Allen H. Duffy Class of 1960 Professor of Law and History
Yale Law School
917-841-1152 (cell)|
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June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Zoe Rubin, an unbelievably smart 2023 graduate of Yale Law School who won multiple paper-writing prizes as a Yale University undergraduate, for a clerkship in your chambers. I recommend her to you with the greatest possible enthusiasm.

By way of background for this recommendation, I served as a law clerk myself both at the United States Court of Appeals for the District of Columbia Circuit and at the Supreme Court of the United States.

Zoe was a truly extraordinary research assistant for me for two years. Unusually, I approached her, rather than the reverse, about research assistant work after having been incredibly wowed by her insightfulness both in class and in office hours when she took Administrative Law with me in 2020. (I was very surprised that her exam did not earn an H in the course, which was blindly graded.) Her work as a research assistant for me was absolutely exceptional for several reasons. First, Zoe is a brilliant thinker. Second, she is an unbelievable writer. She manages to write so clearly and at the same time so beautifully that reading anything she has written is always the thing I most want to do when sitting down to work. Third, I always get the clear sense that Zoe has enormous intrinsic interest in law. Her memos never cut corners or glossed over issues just to "check off" the assignment; rather it felt like she worked until everything, even if complex, was fully intelligible because as someone who loves the law she wanted to do this. To be clear, Zoe is able just to "check it off" when needed; in one instance I gave her a complex administrative law assignment that I needed done very quickly, and I made clear that it would not be possible to do a fully satisfying job in the time available but that I needed the best she could do in short order because I had a preliminary draft of an article due. (I knew I could go back later and make revisions as needed, which I did.) She did a superb job on this time-sensitive project as well.

I was thrilled to have Zoe in my Employment and Labor Law course in 2022, and, completely unsurprisingly, she wrote an outstanding, beautifully written end-of-term paper for the course.

For all of these reasons, I recommend Zoe to you with the greatest possible enthusiasm. I hope that you will not hesitate to contact me, or have anyone from your chambers contact me, at christine.jolls@yale.edu or 203-432-1958 if there is any additional information I might be able to provide in connection with your consideration of her application.

Sincerely,

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Gordon Bradford Tweedy Professor
Yale Law School
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(203) 432-1958

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Legal Writing Sample

The attached writing sample is an excerpt from a bench memorandum regarding a motion to suppress in a hypothetical criminal case, *United States v. Crain*. I wrote this memorandum for Legal Writing II, a course at Yale Law School taught by Professor Noah Messing, in spring 2022. The memorandum is entirely my own work.

In the hypothetical scenario, the defendant, Andrew Crain, faces several federal charges, including armed robbery of a federally insured bank. At trial, the prosecution seeks to use video footage captured from a "pole camera" that the Federal Bureau of Investigation had placed outside Crain's home. This pole camera's lens could pan and tilt to focus on different areas, including Crain's bedroom window and his home's front entrance. Moreover, the pole camera could zoom in on small details of interior spaces that were visible through the home's windows. The government did not obtain a warrant for the pole camera.

The writing sample was written prior to the First Circuit's decision regarding warrantless pole camera surveillance in *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (en banc).

MEMORANDUM

TO: Judge Serena Julien
FROM: Zoe Rubin
DATE: May 25, 2022
RE: *United States v. Crain*: Granting Defendant's Motion to Suppress

The government has charged Andrew Crain with armed robbery of a federally insured bank and other offenses. This memorandum evaluates whether to grant Crain's motion to suppress two video clips that the government seeks to introduce at trial.

I. Questions Presented

The government mounted a video camera to a telephone pole opposite Crain's home (the "pole camera"). For more than fourteen months, it used this hidden camera to film continuously the outside of Crain's home without obtaining a search warrant.

1. Did the government's pole camera use violate the Fourth Amendment?
2. Even if this conduct was unlawful, can the government still introduce video captured by the pole camera at trial?

II. Short Answer

This court should grant Crain's motion to suppress. The Fourth Amendment likely bars the government from engaging in the type of long-term, continuous surveillance at issue here without a warrant. Such surveillance implicates several concerns that have shaped the Supreme Court's recent Fourth Amendment decisions. These concerns include the novel scale of digital age technologies, the intimate nature of the data that such technologies can capture, and the heightened privacy interest associated with the home.

If this court finds the government's conduct to be unlawful, it should not allow the government to use the two video clips at trial. The "exclusionary rule" requires that courts generally forbid the government from presenting evidence obtained through unconstitutional

searches at criminal trials. The Court has acknowledged that this rule does not apply in certain instances where the government acts in objective good faith. But the Court has never applied this "good-faith" exception to a situation where the government conducted a warrantless search and the government did not rely on binding appellate case law or statutory authority.

III. Facts

Suspecting that Crain had committed earlier bank robberies, the Federal Bureau of Investigations (FBI) installed the pole camera outside Crain's Bronx, New York, home on December 28, 2020. For the next two months, the government focused the pole camera nonstop on Crain's second-floor bedroom window. Thereafter, the government redirected the pole camera to record all activity in Crain's driveway and his front yard, which is blocked from street view by a twelve-foot hedge. The pole camera's lens could pan, tilt, and zoom to capture small details, including the text of letters and papers on Crain's bedroom desk.

On March 10, 2022, the pole camera recorded Crain engaging in conduct that, according to the government, implicated him in an armed bank robbery that day. Specifically, at 7:38 a.m. ET, the pole camera captured Crain holding what appears to be a shotgun and walking toward a white Cadillac Escalade parked outside his house. The camera also captured the car's license plate, which is registered to Crain, and the car's distinctive aftermarket rims.

Bank surveillance camera footage from the same day indicates that a car matching the white Cadillac's description, though without a license plate, was used during an armed robbery in Manhattan. The footage shows that four masked men exited the car at 9:00 a.m. ET and returned to it four minutes later.

At 9:27 a.m. ET, the pole camera recorded Crain and three other men exiting an identical white Cadillac, which has the same aftermarket rims and is also missing a license plate. In this

footage, Crain places a shotgun on the roof of his car and hands out what appears to be stacks of cash to each of the other men. The camera records the other men departing and Crain entering his home. When Crain does so, the camera captures his front door and, while the door is temporarily open, the area of his home just inside the front entrance.

The government has submitted two video clips from the March 10 pole camera footage as pre-trial exhibits. Crain seeks to suppress the footage. He argues that the government's nonstop use of a pole camera for 438 days violated the Fourth Amendment. Moreover, he contends that all footage from the camera is unusable at trial because of the "original sin of aiming the camera at a citizen's bedroom window for two months without obtaining a warrant." Def.'s Mot. to Suppress, at 3.

IV. Discussion

This section first considers why the government's conduct may amount to an unlawful search under the Fourth Amendment. It then explains why, if a constitutional violation occurred, this court should not permit the government to use the two video clips at trial.

A. The government's continuous, long-term surveillance of Crain's home without a warrant likely violated the Fourth Amendment.

The Fourth Amendment protects a person's subjective "expectation of privacy" where it is "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). "[O]fficial intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Smith v. Maryland*, 442 U.S. 735, 741 (1979)).

Three themes emerge from the Court's recent Fourth Amendment cases that inform whether a privacy expectation is objectively reasonable. *First*, the Court has emphasized the

traditional limits of law enforcement access to information. *See id.* at 2214 (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)). Relatedly, the Court has noted that new technology can "give police access to a category of information otherwise unknowable." *Id.* at 2218. These ideas have informed recent decisions barring the government from pursuing new forms of long-term, around-the-clock digital monitoring without a search warrant. *See id.* at 2217 (access to 127 days of cellphone location data); *United States v. Jones*, 565 U.S. 400, 402 (2012) (use of a GPS car tracking device for twenty-eight days).

Second, the Court has highlighted the intimate nature of long-term surveillance data. In *Carpenter*, the Court recognized that tracing a cellphone's location over a long period "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

Third, the Court has placed special emphasis on the privacy interests associated with the home. The Court has long noted that "'[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). For this reason, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The "right to retreat" prohibits the government from "stand[ing] in a home's porch or side garden and trawl[ing] for evidence with impunity." *Jardines*, 569 U.S. at 6. Nor can the government, without a warrant, "enter a man's property to observe his repose from just outside the front window." *Id.* Moreover, the Court has acknowledged that government surveillance of the home can "become invasive . . . through

modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986) (quoting from Brief for Petitioner at 14-15); *see also Kyllo*, 533 U.S. at 34 (holding that the use of "sense-enhancing technology" that is "not in general public use" to gain "information regarding the home's interior that could not otherwise have been obtained" without physical intrusion constitutes a search).

Applying the two-part *Katz* test, this court should find that Crain had a reasonable expectation of privacy and thus that the government's conduct required a search warrant. Under *Katz*, the government engages in a Fourth Amendment search when (1) it violates an individual's subjective expectation of privacy and (2) this expectation of privacy is also objectively reasonable. 389 U.S. at 361 (Harlan, J., concurring); *see also Carpenter*, 138 S. Ct. at 2213 (discussing this standard). As for *Katz*'s first prong, Crain's motion here indicates that he did not expect his home would be secretly and continuously filmed for more than fourteen months. And, in terms of *Katz*'s second prong, the nature of the government's surveillance suggests that Crain's expectation of privacy was objectively reasonable. As in *Carpenter*, the government's conduct here went against the traditional view that law enforcement generally cannot conduct long-term, around-the-clock hidden surveillance without detection. *See* 138 S. Ct. at 2217. And as in *Jones*, the government here could "store" the footage and "efficiently mine [it] for information years into the future." 565 U.S. at 415 (Sotomayor, J., concurring).

The intimate character of the footage also suggests that the government's conduct implicates Fourth Amendment concerns. For more than fourteen months, the camera logged every coming and going of Crain, his family, and his visitors. Moreover, it captured a trove of data on the frequency of these comings and goings, the length of visits, and when Crain and his

family were inside the home. This data could reveal details of an "indisputably private nature," such as extramarital affairs, lawyer–client relationships, or at-home religious counseling. *Id*. Allowing the government unchecked access to this information could also chill First Amendment rights. *Id.* at 416 (noting that "[a]wareness that the Government may be watching" can have a chilling effect on "associational and expressive freedoms").

Finally, the pole camera's focus on the home raises additional Fourth Amendment concerns. Because of the camera's pan, tilt, and zoom functions, FBI officers were placed in effectively the same position as if they had physically crossed onto Crain's property and stood on a ladder just outside his bedroom window. Such physical intrusion would violate the "right to retreat" embedded in the Fourth Amendment. *See Jardines*, 569 U.S. at 6. Accordingly, the government's prolonged filming activities also undermined that right. Furthermore, the pole camera functioned as an "invasive," sense-enhancing technology that enabled the government to observe "intimate associations" and "activities" connected with the home that were "otherwise imperceptible" to a police observer. *Cf. Ciraolo*, 476 U.S. at 215 n.3. This enhanced observational capacity stemmed not only from the camera's directional and zoom controls but also from the searchable nature of the camera's extensive footage. With such footage, the government could quickly obtain detailed information about home occupants' relationships and affairs by applying facial recognition technology, license plate reading technology, and other advanced image processing techniques.

In sum, society would likely find that Crain had a reasonable expectation not to be subject to the kind of continuous, long-term pole camera surveillance at issue in this case. Therefore, the government's conduct probably constituted a search within the meaning of the

Fourth Amendment. *See Carpenter*, 138 S. Ct. at 2213. It follows that the government should have obtained a search warrant before using the pole camera. *Id.*

Nonetheless, some courts have suggested that prolonged pole camera use does not amount to a Fourth Amendment search. *See United States v. Tuggle*, 4 F.4th 505, 520-23 (7th Cir. 2021) (collecting cases). One court in this district has reached that conclusion. *See United States v. Mazzara*, No. 16 Cr. 576 (KBF), 2017 WL 4862793, at *12 (S.D.N.Y. Oct. 27, 2017). Yet, many of these pole camera decisions involved different legal and factual circumstances. In particular, most of these decisions, including *Mazzara*, were issued before the Court's opinion in *Carpenter*. Many were also issued before earlier Fourth Amendment precedents relevant to this case, such as *Jones*, *Jardines*, and *Kyllo*. As a result, these pole camera decisions do not reflect the Court's evolving views about the Fourth Amendment's role in the digital age and the special privacy concerns associated with the home. Moreover, these decisions generally focus on pole cameras trained on defendants' driveways, sidewalks, and front entrances, not defendants' bedroom windows or inner yards. *See, e.g.*, *Mazzara*, 2017 WL 4862793, at *9 (noting that the pole camera filmed only what would have been visible to a street observer and "did not . . . record any activities occurring within [the defendant's] residence").

Moreover, these decisions are insufficiently attentive to the privacy concerns associated with the prolonged use of pole cameras focused on private homes. First, these courts have downplayed the depth of personal information from pole cameras as compared with records mapping a person's location. *See, e.g.*, *Tuggle*, 4 F.4th at 524; *Mazzara*, 2017 WL 4862793, at *12. For reasons already recognized by the Court, pole camera footage represents a revealing trove of personal data. Second, at least one appellate court has also emphasized the idea that the government could obtain the same data through traditional human surveillance. *See United States*

v. Moore-Bush, 963 F.3d 29, 40 (1st Cir. 2020), *reh'g en banc granted*, *opinion vacated*, 982 F.3d 50 (1st Cir. 2020). As Justices Sotomayor and Alito made clear in *Jones*, this premise is unrealistic because law enforcement has limited resources and limited power to spy undetected. *See* 565 U.S. at 416 (Sotomayor, J., concurring); *id.* at 430 & n.10 (Alito, J., concurring).

Overall, then, recent Fourth Amendment case law suggests that the government's conduct here likely infringed on Crain's reasonable expectation of privacy. Because the government never obtained a search warrant to use the pole camera, it probably violated the Fourth Amendment.

B. If this court finds that the government violated the Fourth Amendment, it should bar the government from using evidence from the pole camera at trial.

Courts may suppress unlawfully acquired evidence for the "sole purpose" of deterring future Fourth Amendment violations. *Davis v. United States*, 564 U.S. 229, 236-37 (2011). This "exclusionary rule" is a "not a personal constitutional right" but rather a "prudential" doctrine. *Id.* at 236. It applies only when the "deterrent value" outweighs the cost to "truth" and public safety. *Id*. at 237. The Court has explained that "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* at 238 (quoting *United States v. Herring*, 55 U.S. 135, 144 (2009)).

Meanwhile, the Court has permitted the government to introduce evidence from unlawful searches "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 909 (1987)). This "good-faith" exception to the exclusionary rule also applies to police conduct that involves only "isolated negligence." *United States v. Herring*, 555 U.S. 135, 137 (2009).

Here, the government's conduct amounts to the kind of serious disregard for Fourth Amendment rights that the exclusionary rule is meant to deter. The government used sense-enhancing technology to conduct prolonged, continuous surveillance of a private home. In doing so, the government could obtain a trove of information about the home occupants' contacts and activities that it likely could not have obtained via traditional surveillance. Without such technology, moreover, the government could not have accessed other information, such as the contents of desk papers and letters, without physically intruding into the home. The record does not indicate that the government considered whether its pole camera use implicated the Fourth Amendment. Thus, preventing the government from introducing evidence obtained via the pole camera at trial will likely incentivize the government to seek a search warrant before conducting similar pole camera surveillance in the future.

Finally, the government's conduct does not fall within any of the categories that the Court has previously recognized as "good-faith" exceptions to the exclusionary rule. The government did not reasonably rely on a warrant later found to be invalid. *Cf. Leon*, 468 U.S. at 922. The government did not rely on a later-invalidated statute. *Cf. Illinois v. Krull*, 480 U.S. 340, 364 (1987). And the government did not rely on controlling appellate precedent. *Cf. Davis*, 564 U.S. at 249-50. Nor did the government's search result from "isolated negligence" in police recordkeeping. *Cf. Herring*, 555 U.S. at 137. Rather, the government chose not to seek a search warrant before engaging in surveillance that implicated legitimate privacy interests protected by the Fourth Amendment. The Court has never applied the "good-faith" exception to a situation where the government conducted a warrantless search and did not rely on binding appellate case law or statutory authority. This court should not do so here.

V. Conclusion

In sum, this court should grant Crain's motion to suppress. Yet the issues that it raises deserve close legislative and judicial scrutiny. Courts are divided over whether extended, continuous government pole camera use without a warrant violates the Fourth Amendment. Because of that "substantial ground for difference of opinion," this court should issue an order certifying an interlocutory appeal. 28 U.S.C. § 1292(b). The Second Circuit could then address this important constitutional question as a matter of first impression.

Applicant Details

First Name	**Kathryn**
Last Name	**Sachs**
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Applicant Education

BA/BS From	**Dartmouth College**
Date of BA/BS	**June 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 18, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

KATHRYN SACHS
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June 9, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto,

I am a 2023 law graduate of New York University School of Law, and I am writing to apply for a clerkship in your chambers for the 2025 term or any subsequent term. This fall, I will begin a year-long fellowship project at the New York Civil Liberties Union. The following year, I will clerk for Eastern District Magistrate Judge Taryn Merkl. Claudia Angelos, who co-taught my clinic, recommended that I apply for this position. After completing my fellowship and initial clerkship, I would be very grateful to serve in your chambers.

Please find enclosed my resume, transcript, writing sample, and letters of recommendation. The writing sample is a memorandum I prepared during my clinical internship with the ACLU. My first recommendation letter is from Professor Kenji Yoshino, with whom I took two classes at NYU. He is available at kenji.yoshino@nyu.edu and at 212.998.6421. The second letter is from Professor Erin Murphy, for whom I worked as a research assistant. She is available at erin.murphy@nyu.edu. My third recommendation letter is from Clinical Professors Claudia Angelos and Jason Williamson. Claudia is available at claudia.angelos@nyu.edu and 212.998.6462. Jason is available at jason.williamson@nyu.edu.

If you have any questions, please do not hesitate to reach out to me at kks9785@nyu.edu or at 202.384.2675. Thank you for your time and consideration.

Respectfully,

Kathryn Sachs

Kathryn Sachs

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Juris Doctor, May 2023
Unofficial GPA: 3.64
Honors: *NYU Review of Law & Social Change*, Senior Articles Editor (2022-23), Staff Editor (2021-22)
Activities: *NYU Law Racial Justice Clinic*, Student Advocate (2022-23)
Prof. Erin Murphy (Evidence), Research Assistant (2022-23; 2021)
Prof. Samaha (Disability Law), Directed Research (2021-22)
Prof. Simson (Lawyering), Teaching Assistant (2021-22)
Public Interest Law Students' Association, Working Group Board Member (2021-22)

DARTMOUTH COLLEGE, Hanover, NH
Bachelor of Arts in History, *cum laude*, June 2018
Honors: Rufus Choate Scholar (top 5% of class) (2017-18)
James O. Freedman Presidential Scholar Research Assistant (2015-16)

LEGAL EXPERIENCE

HONORABLE TARYN MERKL, U.S. MAGISTRATE JUDGE, EASTERN DISTRICT OF NEW YORK, New York, NY
Judicial Clerk, September 2024 – September 2025 (incoming)

NEW YORK CIVIL LIBERTIES UNION, New York, NY
PILC Fellow, Disability Justice Project, September 2023 – September 2024 (incoming)

AMERICAN CIVIL LIBERTIES UNION, New York, NY
Criminal Legal Reform Project Intern, September 2022 – May 2023
Drafted memoranda outlining complex impact litigation strategy for pending lawsuits to challenge federal administrative delay and unconstitutional conditions of confinement. Final documents informed potential plaintiffs and allowed supervisors to adjust approach before filing.

UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC
Legal Intern, Civil Rights Division, Disability Rights Section, May 2022 – August 2022
Assisted with enforcement of the Americans with Disabilities Act. Conducted factual and legal research for statements of interest and investigations into criminalization of mental illness. Evaluated employment discrimination claim and recommended final disposition. Drafted consent decree, which the court adopted, for reasonable accommodations and damages. Assisted with settlement negotiations in statewide community integration matter.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, New York, NY
Student Extern, Taxpayer Protection Bureau, Economic Justice Division, September 2021 – December 2021
Conducted research to answer substantive questions for oral argument, appeals, and settlement. Drafted memoranda analyzing various potential negotiation positions. Evaluated evidence in NYS False Claims Act investigations.

MOBILIZATION FOR JUSTICE, New York, NY
Legal Intern, Housing Rights Project, June 2021 – August 2021
Drafted and filed contempt motion in affirmative repairs case. Fielded intake interviews, investigated housing violations, and provided information to low-income clients in crisis. Researched privacy rights of single room occupancy tenants facing private landlord harassment. Drafted *amicus* brief arguing for expanded protection.

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE, New York, NY
Trial Preparation Assistant, Trial Bureau 70, July 2018 – July 2020
Managed operations for first-ever restorative justice resolution in homicide case. Drafted training materials for resulting felony restorative justice resolution program. Served as third chair on homicide trial. Evaluated evidence, collected and managed discovery, and prepared cases and witnesses for Grand Jury presentation and criminal trials.

Name: **Kathryn K Sachs**
Print Date: **05/31/2023**
Student ID: **N13644157**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Torts	LAW-LW 11275	4.0	B+
Instructor: Eleanor M Fox			
Procedure	LAW-LW 11650	5.0	B
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	A-
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Race, Injustice, and the Ameri			
Instructor: Randy Hertz			
Vincent Southerland			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A-
Instructor: Kenji Yoshino			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Avani Mehta Sood			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Randy Hertz			
Vincent Southerland			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Civil Rights	LAW-LW 10265	4.0	A-
Instructor: Baher A Azmy			
Family Law	LAW-LW 10729	4.0	B+
Instructor: Melissa E Murray			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: David Simson			
Disability Law and Theory Seminar	LAW-LW 12512	2.0	A
Instructor: Adam M Samaha			
Current Issues in Civil Liberties Seminar	LAW-LW 12610	2.0	B+
Instructor: Steven Shapiro			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Examining Disability Rights and Centering Disability Justice	LAW-LW 10983	3.0	A
Instructor: Natalie Michele Chin			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Geoffrey P Miller			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: David Simson			
Property	LAW-LW 11783	4.0	A-
Instructor: Gregory Ablavsky			
Directed Research Option B	LAW-LW 12638	1.0	A
Instructor: Adam M Samaha			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	58.0	58.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Racial Justice Clinic	LAW-LW 10012	2.0	A
Instructor: Claudia Angelos			
Jason D Williamson			
Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Racial Justice Clinic Seminar	LAW-LW 11764	3.0	A-
Instructor: Claudia Angelos			
Jason D Williamson			
Review of Law & Social Change	LAW-LW 11928	1.0	CR
Leadership, Diversity, and Inclusion Seminar	LAW-LW 12449	2.0	A+
Instructor: Kenji Yoshino			
Gabriel Y Delabra			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	70.0	70.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Racial Justice Clinic	LAW-LW 10012	3.0	A
Instructor: Claudia Angelos			
Jason D Williamson			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A
Instructor: Helen Hershkoff			
Racial Justice Clinic Seminar	LAW-LW 11764	2.0	A
Instructor: Claudia Angelos			
Jason D Williamson			
Review of Law & Social Change	LAW-LW 11928	1.0	CR
Leadership, Diversity, and Inclusion Seminar	LAW-LW 12449	2.0	A+
Instructor: Kenji Yoshino			
Gabriel Y Delabra			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Erin Murphy			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	83.0	83.0

Staff Editor - Review of Law & Social Change 2021-2022
Senior Articles Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective Fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

Updated: 10/4/2021

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

***Pomeroy Scholar**:*	Top ten students in the class after two semesters
***Butler Scholar**:*	Top ten students in the class after four semesters
***Florence Allen Scholar**:*	Top 10% of the class after four semesters
***Robert McKay Scholar**:*	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU | LAW

KENJI YOSHINO
Chief Justice Earl Warren Professor of Constitutional Law
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June 06, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

RE: Kathryn Sachs, NYU Law '23

Dear Judge Matsumoto:

It is a great pleasure to recommend Kathryn Sachs, a 2023 graduate of NYU School of Law, for a clerkship in your chambers. I first met Kathryn when she took my Constitutional Law course in the spring of her first year. I then worked with her for the entire 2022-23 academic year when she took my two-semester course titled "Leadership, Diversity, and Inclusion." I therefore feel I know Kathryn extremely well, and feel confident in giving her my strongest recommendation.

Kathryn was a terrific student in my Constitutional Law class. She took the class as her sole elective in her first year, which mean that she was studying alongside sixty-four peers who were passionate about Constitutional Law. Even among this cohort, Kathryn stood out as a thoughtful, sensible, and generous student. She had a disarmingly direct way of approaching class discussions that cut through cant without sacrificing complexity. She also routinely built on what her peers had said in class in advancing her own points. While she was not a "gunner," we all learned to take her seriously when she made an intervention. She participated evenly across both the structure and rights portions of the class and received an easy "A-minus" in the course.

I came to have even deeper respect for Kathryn's capabilities when she took my year-long seminar on diversity and inclusion in her third year. This course has an enrollment limited to eighteen students. It seeks to "boot camp" them not only on the substance of diversity and inclusion, but also on practical skills such as writing and oral presentations. Kathryn was the top student in the course, earning the sole "A-plus" grade my co-instructor and I awarded that year.

Kathryn was a kind of decathlete in showing a myriad different excellences in this course. Her class participation were, if possible, even more trenchant and on point—she was the student who carried the class on a slow day. Her oral presentations were simultaneously informal and polished—she was so well prepared that she was able to adopt a conversational style. Most significantly, her written work was stellar. She wrote two drafts of a paper reacting to Iris Bohnet's What Works: Gender Equality by Design. In this effort, Kathryn extolled the virtues of what she titled "quiet DEI," meaning diversity and inclusion efforts that did not explicitly focus on a particular demographic cohort. Given the Supreme Court's emerging antipathy to overt race-based classifications, this paper could not have been more topical. When I caught up with Professor Bohnet recently, I mentioned this paper as one of the best comments I had seen on her work by any scholar of any seniority.

Kathryn will be a deep credit to our profession. She is passionately committed to public interest law and will be working after graduation for the New York Civil Liberties Union. I know she will be one of the students whom I will be most proud to have taught.

If I were you, I would not hesitate!

Sincerely,

/s/ Kenji Yoshino

Kenji Yoshino

Erin E. Murphy
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June 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

RE: Kathryn Sachs

Dear Judge Matsumoto:

It is with my utmost enthusiasm that I write to recommend Kathryn Sachs for a clerkship in your chambers. Kathryn is an exceptionally talented, smart, and accomplished student who will make an extraordinary law clerk. She has worked for me since the summer of 2021, and my only complaint is that she now plans to graduate and work for someone else!

I first met Kathryn when, with what I later learned is her customary proactiveness, she reached out to me in her first year to express interest in my research and to offer her assistance. After chatting with her, I realized I would be foolish not to hire her – she had already studied my work prior to our first conversation! And indeed, I soon came to appreciate how much Kathryn's entrepreneurial spirit is one of her finest qualities.

Kathryn's responsibilities for me in the summer of 2021 involved research in connection with my work as a co-author of the Modern Scientific Evidence treatise. The treatise is an unusual combination of science and law – each topical chapter summarizes the state of the science, and a companion part addresses significant legal opinions. She was entrusted with the section on fire science and arson – a field that has changed a lot over the years, and for which there are a large volume of cases.

She sifted through an enormous amount of material – all the cases, both civil and criminal, involving fire science evidence for the past year – and highlighted and organized opinions of import. It is difficult and tedious work, in that there are an large number of cases and ascertaining which are important involves an understanding of the evolution of fire science in all its fine points (and amusing turns of phrase, like "crazed glass"), along with a working knowledge of the rules of evidence. Kathryn performed to the highest standard, with minimal oversight from me and no formal training in the law of evidence. She turned in an exceptional work product that was organized precisely by sub-category, and extracted the key points. I should add that she was also working as an intern for Mobilization for Justice during this time, and so she was completing this research in her spare hours. Her willingness to roll up her sleeves and dig in – and to go the extra mile to make sure that work is done right, will no doubt serve her well in any chambers.

I took a public service leave during her second year, but in her third year of law school we resumed working together. The amount of high quality, exceptional research she has completed for me this year has been staggering. She may be the most productive RA that I have ever had. Given that I had such confidence and faith in her abilities, I entrusted her with a complicated research project in connection with a brief amicus curiae that I am authoring. She managed to produce incredibly helpful materials – including by arranging inter-library loans (of actual books in other libraries – a skill I thought most Gen Z had lost!), filing freedom of information act requests for archival agendas of an obscure bureaucratic committee (successfully!), and culling through a wide variety of sources both legal and nonlegal to help produce both a narrative timeline in support of my brief as well as key citations and sources. Her work all along was just fantastic – far, far beyond what a typical RA would produce, and showed that same entrepreneurial spirit in research that she has shown in all other aspects of her endeavors. And her work for me is impeccable – ever time I read a case, it stands precisely for the idea that she cited it for, and she selected the exact right quotation to support my claims.

I will close by saying that, as is evident from Kathryn's resume, along with the courses that she has chosen to pursue, Kathryn has a deep commitment to public service. In additional to her professional experiences before and during law school, Kathryn has served in leadership roles for the NYU Review of Law and Social Change, Law Women, the Public Interest Law Students' Association, and the Mental Health law and Justice Association. I also happen to know that three of our clinical professors, each of whom worked with Kathryn, think as highly of her as I do.

In sum, I highly commend her application to your consideration, and know that she will make as extraordinary a law clerk as she has been a research assistant. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Erin Murphy - erin.murphy@nyu.edu - (212) 998-6672

Erin E. Murphy
Norman Dorsen Professor of Civil Liberties

Erin Murphy - erin.murphy@nyu.edu - (212) 998-6672

June 04, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Kathryn Sachs, NYU Law '23
Clerkship Application

Dear Judge Matsumoto:

It is a privilege to recommend Kathryn Sachs, New York University School of Law Class of 2023, for a clerkship with Your Honor. During this past year, her last at NYU Law, Kathryn has participated in the Racial Justice Clinic. Students in the Clinic work on teams handling national-level civil rights litigation with the ACLU and individually directly represent people serving life sentences in New York State prisons on parole matters. This work is all done under close faculty supervision, and in addition the students participate in a weekly seminar and complete a simulation program. They write weekly papers responding to readings that include racial justice advocacy theory and litigation strategy. I come to know each student's strength of intellect, talent for lawyering, and quality of character well. Every aspect of Kathryn Sachs's work is devoted and effective. Her excellent character, keen intellect, open-mindedness, and extremely good work ethic ensure that she would be of great assistance to you.

We aim in the clinic to transform law students into capable, novice-level civil rights litigators who are prepared to navigate the challenges surrounding that important work. Students become familiar with and engage in simulated practice in all aspects of pre-trial litigation, including case selection, client interviews, pleadings, initial court appearances, motions and depositions. They come to understand the critical necessity of ends-means strategic thinking in all litigation, and the challenges of identifying client goals and working collaboratively toward those ends in every task they undertake as counsel. Kathryn has mastered each skill with ease and ably brought her intelligence, insight, and life experience into our ongoing conversations about the kinds of relationships lawyers can choose to have with clients. She is intensely curious, unfailingly honest, and extremely kind. And importantly, she listens hard and speaks with care. Clinic students write weekly papers in connection with the seminar, and Kathryn's are always beautifully written and reasoned and well worth waiting for.

Kathryn's field work in the clinic has been excellent. She has had direct responsibility for handling an extremely difficult parole matter for a person serving a life sentence for a homicide. She demonstrated excellent strategic and ethical judgment in her work on this case, and her written products were terrific. Perhaps more important from the Court's point of view, Kathryn has also excelled in her work at the ACLU. I can do no better than report to you what her supervisor, Emma Andersson, Deputy Director of the Criminal Law Reform Project, has shared with me about her work there:

I would jump at the chance to have Kathryn on staff. She is a meticulous researcher, a creative thinker, a committed advocate, a conscientious worker, and a collaborative and kind colleague. Kathryn has eagerly taken on challenging work assignments with me and done excellent work. She both works independently and knows when she has reached a critical point that requires input and direction. She takes feedback exceptionally well and, as a result, she is rapidly improving her already impressive skills.

Kathryn is a genuine intellectual with the interest and tenacity to be a first-rate law clerk. Her keen insights and wide-ranging knowledge graced every class discussion and case strategy session she was a part of. She's a prodigious worker; she seemed always to be at work on clinic matters when the evidence is that she was accomplishing all kinds of other things at the same time. In connection with writing this letter, I took the opportunity look at Kathryn's grade transcript. She is a strong student in an exceptionally strong class.

I have been constantly impressed with Kathryn. Her collaborations with other students in the clinic are generous, warm, and effective. She is a terrific team player, but she works independently whenever necessary. She is grateful for supervision but needs little of it. She successfully mastered the basics of federal litigation in our simulation program and in her field work with ease. There is no question that she is ready to bring her considerable talents to chambers.

Thank you for considering her.

Very truly yours,

Claudia Angelos

Claudia Angelos - angelos@mercury.law.nyu.edu

KATHRYN SACHS
5 East 88th Street #4 · New York, NY 10128 · (202) 384-2675 · kks9785@nyu.edu

The following writing sample is a memorandum I prepared during an internship with the American Civil Liberties Union's Criminal Legal Reform Project (CLRP). This internal memorandum helped CLRP assess the viability and strategic value of a lawsuit. The document uses the ACLU's preferred format.

Before circulating this memorandum, I received permission from my supervisor and removed all confidential facts and legal theories. This work is my own and has not been substantially edited by anyone else.

Writing Sample
Kathryn Sachs

To: [ACLU Supervisor]
From: Kathryn Sachs
Subject: Habeas Class Action Viability
Date: March 20, 2023

1) Factual Background

[Omitted for confidentiality]

2) Questions Presented

1. Do the First, Second, Third, Fourth, Ninth, and/or D.C. Circuits allow class action certification in habeas corpus cases?

2. Which circuits allow classes to challenge conditions of confinement via habeas?

3. During class certification, what proposed class size would prompt each circuit to presume numerosity?

3) Short Answers

1. The First, Second, and Ninth Circuits permit habeas class actions. The Third and Fourth Circuits have no rule, but unreversed district court opinions support availability. The D.C. Circuit has not addressed the question.

2. The Second Circuit most clearly allows habeas class actions challenging conditions of confinement. The First and D.C. Circuits may permit those lawsuits as well. All other circuits require alternative pleadings.

3. Circuits generally presume that joinder becomes impracticable with 40 or more plaintiffs based on numbers alone.

4) Full Answers

1. Are Habeas Class Actions Available in the Supreme Court or the Second, Third, Fourth, Ninth, and/or the D.C. Circuit Courts of Appeal?

The Supreme Court has never decided whether people seeking habeas relief may properly seek class status. *See, e.g.*, *Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984) (citations omitted) ("We have never decided whether Federal Rule of Civil Procedure 23, providing for class actions, is applicable to petitions for habeas corpus relief. [Because appellants did not raise the issue on appeal], we have no occasion to reach the question."). While recent dicta and dissents

indicate that current Supreme Court justices may disfavor habeas class actions,[1] no holding bars their viability.

The First, Second, and Ninth Circuits have all permitted habeas class action lawsuits. *See Da Graca v. Souza*, 991 F.3d 60 (1st Cir. 2021); *U.S.* ex rel. *Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *Vazquez Perez v. Decker*, No. 18-CV-10683, 2020 WL 7028637, at *6 (S.D.N.Y. Nov. 30, 2020) (citing *Sero*, 506 F.2d 1115); *Sacora v. Thomas*, 628 F.3d 1059 (9th Cir. 2010); *Rodriguez v. Hayes*, 591 F.3d 1105, 1113 (9th Cir. 2010).

The Third and Fourth Circuit Courts of Appeal have not addressed whether habeas jurisdiction allows for class certification. However, district court decisions in each circuit support the prospect. *See Gayle v. Warden Monmouth Cnty. Corr. Inst.*, No. 12-CV-02806, 2017 WL 5479701, at *7 (D.N.J. Nov. 15, 2017) ("This Court instructed Plaintiffs to file an amended habeas petition and class action complaint[.]"); *Diaz v. Hott*, 297 F. Supp. 3d 618, 626 (E.D. Va. 2018), *aff'd sub nom. Chavez v. Hott*, 940 F.3d 867 (4th Cir. 2019) (noting that class certification was not challenged on appeal), *rev'd on other grounds sub nom. Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2284 n.3 (2021).[2] The Fourth Circuit seems like a friendlier forum for such lawsuits than the Third Circuit. *See Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL

[1] In 2018, the Supreme Court raised questions about class certification in similar contexts when ordering remand. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972) ("[T]he Court of Appeals should also consider on remand whether a Rule 23(b)(2) class action litigated on common facts is an appropriate way to resolve respondents' Due Process Clause claims."). *See also id.* at 858 (Thomas, J., dissenting) (finding that petitioners did not seek habeas as traditionally defined in part because they sought relief on behalf of a class); *Nielsen v. Preap*, 139 S. Ct. 954 (2019) (raising concerns about jurisdiction in habeas class actions in a fractured opinion).

[2] *See also Geraghty v. U.S. Parole Comm'n*, 429 F. Supp. 737, 740 (M.D. Pa. 1977), *rev'd*, 579 F.2d 238 (3d Cir. 1978), *vacated*, 445 U.S. 388 (1980) ("Despite the technical nonapplicability of Rule 23, procedures analogous to a class action have been fashioned in habeas corpus actions where necessary and appropriate."). The appellate court reversed, holding in relevant part that habeas was not the only remedy available and that the district court improperly denied class certification. The Supreme Court opinion focused on mootness without addressing this habeas question.

5593338, at *7 (D. Md. Sept. 18, 2020) (citations omitted) ("[T]here is substantial precedent for pursuing habeas actions on a class basis.").

The District of Columbia Circuit Court of Appeals has not addressed the permissibility of habeas class actions.[3] This doctrinal gap may exist because "[a] petitioner's 'immediate custodian' is the proper respondent in a Section 2241 habeas corpus action." *White v. Garland*, No. 1:21-CV-03398, 2022 WL 266705, at *2 (D.D.C. Jan. 18, 2022) (citations omitted). Since there are no federal prisons in Washington, D.C.,[4] federal habeas claims might be impossible to bring in D.C.

2. Are habeas class actions available to challenge conditions of confinement?

Habeas class actions challenging conditions of confinement could survive in the Second, First, and D.C. Circuits. Since few definitive rules govern such cases, potential litigants should first determine whether habeas is available to challenge conditions of confinement even in individual cases in the relevant circuit.

A. Can individuals use habeas statutes to challenge conditions of confinement?

The Supreme Court has not clarified whether habeas class actions are available to challenge conditions of confinement. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862–63 (2017).[5]

[3] Some district court caselaw could support a habeas claim. *See, e.g.*, *Streicher v. Prescott*, 103 F.R.D. 559, 561 (D.D.C. 1984) ("although the precise requirements of FRCP 23 do not apply to habeas corpus proceedings, analogous procedures have been utilized in habeas actions under certain circumstances"); *Banks v. Booth*, 468 F. Supp. 3d 101 (D.D.C. 2020) (plaintiffs filed motion for preliminary injunction using habeas and § 1983, and the court granted preliminary injunction on grounds other than habeas without having ruled on class certification).
[4] *See* Federal Bureau of Prisons, *Our Locations*, https://www.bop.gov/locations/list.jsp (last visited May 16, 2023).
[5] Dicta in recent and past cases indicates some openness to claims challenging conditions of confinement. *See id.* (noting that if habeas was available, it would serve as a more effective remedy than the *Bivens* action at play); *Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."). *But see Nelson v. Campbell*, 541 U.S. 637, 643 (2004) ("constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core and *may* be brought pursuant to § 1983 in the first instance.").

Eleven circuits have considered whether habeas is an appropriate vehicle through which to challenge conditions of confinement. Of those, only the First, Second, and D.C. Circuits have held that plaintiffs can challenge conditions of confinement under 28 U.S.C. § 2241. *See Miller v. United States*, 564 F.2d 103, 105 (1st Cir. 1977); *Jiminian v. Nash*, 245 F.3d 144, 146–47 (2d Cir. 2001); *Aamer v. Obama*, 742 F.3d 1023, 1036 (D.C. Cir. 2014). *But see Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021) ("Habeas corpus tests the fact or duration of the confinement, rather than conditions"). The First Circuit's caselaw conflicts and has become more restrictive over time. *Compare U.S. v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006) ("If the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available."), *and Brennan v. Cunningham*, 813 F.2d 1, 4 (1st Cir. 1987) (rejecting § 1983-only interpretation of *Prieser* and holding that habeas was the proper vehicle for conditions of confinement claim), *with Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873-74 (1st Cir. 2010) (plaintiffs must bring conditions of confinement challenges to state custody under 42 U.S.C. § 1983, not habeas).

Most circuits, including the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, hold that habeas claims are unavailable to challenge conditions of confinement. Instead, plaintiffs must bring constitutional violation claims against the state using 28 U.S.C. § 1983. *See Cardona v. Bledsoe*, 681 F.3d 533, 537 (3d Cir. 2012); *Davis v. Fechtel*, 150 F.3d 486, 490 (5th Cir. 1998); *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004); *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991); *Spencer v. Haynes*, 774 F.3d 467, 469–70 (8th Cir. 2014); *Nettles v. Grounds*, 830 F.3d 922, 933–34 (9th Cir. 2016); *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811–12 (10th Cir. 1997); *Vaz v. Skinner*, 634 F. App'x 778, 780 (11th Cir. 2015) ("Petitioner's §

2241 petition is not the appropriate vehicle . . . [because] such a claim challenges the conditions of confinement, not the fact or duration of that confinement.").

The Fourth Circuit has not decided whether habeas claims are available to challenge conditions of confinement. *See Farabee v. Clarke*, 967 F.3d 380, 395 (4th Cir. 2020) ("We have yet to address this issue in a published opinion."). However, the Fourth Circuit seems hostile to such claims. *See Wilborn v. Mansukhani*, 795 F. App'x 157, 163-64 (4th Cir. 2019).[6]

Individual plaintiffs could bring habeas challenges to conditions of confinement in the First, Second, or D.C. Circuits. However, this imbalanced circuit split indicates that any appeal could risk further foreclosing incarcerated plaintiffs' legal options.

B. Where can habeas class action lawsuits challenge conditions of confinement?

Petitioners can bring habeas class actions challenging conditions of confinement in the First and Second Circuits. Theoretically, a plaintiff federally incarcerated in D.C. could also bring a claim within the D.C. Circuit. The Second Circuit is the most promising potential option.

The First Circuit has not assessed whether plaintiffs can bring habeas class actions challenging conditions of confinement. However, it has not disturbed preliminary class certifications in this category. *See Da Graca v. Souza*, 991 F.3d 60 (1st Cir. 2021) (noting immigration detainees were members of habeas class during COVID seeking release or community-based placement); *Savino v. Souza*, 453 F. Supp. 3d 441 (D. Mass. 2020) (granting preliminary class certification in underlying case); *Yanes v. Martin*, 464 F. Supp. 3d 467 (D.R.I. 2020) (granting provisional class certification for habeas claim challenging conditions of

[6] This memo does not address doctrine in the Federal Circuit.

confinement). No recent opinions have undermined this trend. While the First Circuit has not clearly endorsed full class certification, these cases indicate that this posture may be available.

Currently, the Second Circuit is the friendliest jurisdiction for habeas class action lawsuits challenging conditions of confinement. In *Sero v. Preiser*, the Southern District of New York made clear that "[t]here is no doubt that a class action may be appropriate for habeas corpus purposes as well as for § 1983." 372 F. Supp. 660, 662 (S.D.N.Y. 1974). The Second Circuit, while acknowledging that this rare remedy is not technically a Rule 23 proceeding, upheld the district court's certification. 506 F.2d 1115 (2d Cir. 1974). Recent district court decisions adopt this rule. *See, e.g.*, *Vazquez Perez v. Decker*, No. 18-CV-10683, 2020 WL 7028637, at *6 (S.D.N.Y. Nov. 30, 2020); *Fernandez-Rodriguez v. Licon-Vitale*, 470 F. Supp. 3d 323 (S.D.N.Y. 2020).[7] Since the Second Circuit, unlike the First Circuit, has clarified that some habeas class action-equivalents challenging conditions of confinement can proceed, it may be the most legally sound location for such a lawsuit.

The D.C. Circuit is not an ideal forum for this kind of case for two reasons. First, the jurisdiction lacks federal prisons from which petitioners could sue. *See supra* § 4(1). Second, recent dicta muddle the D.C. Circuit's previously clear rule on habeas in conditions of confinement cases. *See Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021) ("Habeas corpus tests the fact or duration of the confinement, rather than conditions"). Since two jurisdictions provide clearer paths forward, the D.C. Circuit is not the best first option.

3. What are the relevant circuits' default numerosity requirements?

[7] One older Circuit Court case affirmed a district court class certification, indicating that the carefully assessed facts in *Sero* are not necessarily a ceiling. *See Bertrand v. Sava*, 684 F.2d 204, 209 (2d Cir. 1982) (holding in part that lower court's "certification of the class of fifty-three persons will be left undisturbed[.]").

Writing Sample
Kathryn Sachs

Class actions lawsuits are permissible only when "joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1) ("numerosity"). No strict numerical limits or parameters govern numerosity. WILLIAM RUBENSTEIN, NEWBURG AND RUBENSTEIN ON CLASS ACTIONS § 3:11 (6th ed. 2022); *Ballard v. Blue Shield*, 543 F.2d 1075, 1080 (4th Cir. 1976) ("numbers alone are not controlling," and courts should consider "all of the circumstances of the case."). The Supreme Court has not laid out clear guidelines for this determination.

In most circuits, courts presume numerosity with more than 40 members and hesitate to certify classes with fewer than 20 members. WILLIAM RUBENSTEIN, NEWBURG AND RUBENSTEIN ON CLASS ACTIONS § 3:12 (6th ed. 2022). *See also Gen. Tel. Co. v. EEOC*, 446 U.S. 318 (1980) (indicating that a group of 15 potential class members might be a floor). Every circuit surveyed here adopts a version of this presumption.

The Second, Third, and Fourth Circuits have all stated that courts usually presume that joinder of 40 cases is impracticable. *See, e.g.*, *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (citing *Newberg*); *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 234 (4th Cir. 2021) ("As a general guideline, . . . a class that encompasses fewer than 20 members will likely not be certified . . . while a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.").

The First, Ninth, and D.C. Circuits have not issued a clear rule, but district court cases in all three circuits support the 40-class member default. *See Anderson v. Team Prior, Inc*., 2022 WL 1156056, at *3 (D. Me. 2022); *Coffin v. Bowater Inc*., 228 F.R.D. 397, 402 (D. Me. 2005); *In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 307 (N.D. Cal. 2018); In re *Banc of Cal. Sec. Litig.*, 326 F.R.D. 640, 646 (C.D. Cal. 2018); *Coleman through Bunn v. D.C.*, 306 F.R.D. 68, 76

(D.D.C. 2015). District courts within the Ninth and D.C. Circuits have referenced a 20-person floor. *See Celano v. Marriott Intern., Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007); *Coleman*, 306 F.R.D. at 76.

Once the ACLU has filed a complaint, class size fluctuation would not threaten the case. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (explaining that claims based on short term forms of incarceration are 'capable of repetition yet evading review' and that class members' release does not moot their case). *See also Sacora v. Thomas*, No. CV 08-578-MA, 2009 WL 4639635 (D. Or. Dec. 3, 2009), *aff'd*, 628 F.3d 1059 (9th Cir. 2010) (finding that plaintiffs, having originally certified over 1,860 class members, still met numerosity requirement with only 10 cases actively pending before the court); *Dean v. Coughlin*, 107 F.R.D. 331, 332-33 (S.D.N.Y. 1985) ("the fluid composition of a prison population is particularly well-suited for class status, because, although the identity of the individuals involved may change, the nature of the wrong and the basic parameters of the group affected remain constant."). Classes are determined at the time of filing. That said, valid claims must exist throughout the lawsuit. *Hinton v. D.C.*, 567 F. Supp. 3d 30, 56 (D.D.C. 2021) (citations omitted) ("'[S]ome class members [must] retain a live claim at every stage of litigation.' If the class is only sparsely and sporadically populated by individuals with live claims . . . it becomes more difficult for the Court to find that the inherently transitory exception will be satisfied.").

4. Conclusion

The First, Second, and D.C. Circuits are the only circuits that allow habeas class action lawsuits. In all three circuits, litigants can challenge conditions of confinement via habeas class actions, but the Second Circuit has the friendliest and clearest law.

Each circuit assumes that 40 cases make joinder impracticable. Several circuits also default to a 20-person floor. Class member fluctuation should not moot a case challenging short-term carceral conditions.

If the ACLU brings a habeas class action lawsuit challenging conditions of confinement, the Second Circuit seems like the strongest potential jurisdiction.

Applicant Details

First Name	**Tess**
Last Name	**Saperstein**
Citizenship Status	**U. S. Citizen**
Email Address	**tesssaperstein@gmail.com**
Address	**Address** Street **85 4th Ave. Apt. 7JJ** City **New York** State/Territory **New York** Zip **10003** Country **United States**
Contact Phone Number	**5618868247**

Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 17, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Moot Court Board (journal equivalent)**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Frank A. Schreck Gaming Law Moot Court Competition (coach)** **Herbert Wechsler National Criminal Law (competitor)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Weissmann, Andrew
andrewweissmann@gmail.com
917-575-2171

Rosenblum, Noah
noah.rosenblum@nyu.edu
212-998-6009

Siffert, John
JSiffert@lswlaw.com
212-921-8399

Shane, Peter
pms9616@nyu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

TESS SAPERSTEIN
85 4th Ave., Apt. 7JJ, New York, NY 10003
(561) 886-8247 • ts4282@nyu.edu

June 10, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I graduated from New York University School of Law in May 2023 and will commence working at Arnold & Porter this fall. I am writing to express my interest in applying for a clerkship in your chambers during the 2025–26 term or any subsequent term that may be available.

Having completed a judicial externship with Judge Gujarati, I worked alongside her clerks and became comfortable with the rigors of a district judge's chambers. Working on Social Security appeals, I synthesized records that were hundreds of pages long and identified and applied the applicable standard of review. I would be excited to bring this research and writing experience to your chambers as a clerk.

I have enclosed my resume, law school transcript, undergraduate transcript, and two writing samples with this letter. My first writing sample is an excerpt from my appellate brief which won fourth best brief at the Herbert Wechsler National Criminal Law Moot Court Competition. My second writing sample is an article I published in *NYU Proceedings,* "Barred from Birthright: The Constitutional Case for American Samoan Citizenship."

My letters of recommendation are from Professor Noah Rosenblum, Professor Andrew Weissmann, Professor John Siffert, and Professor Peter Shane. I worked as a research assistant for Professor Rosenblum during both my 2L and 3L year. He also supervised my directed research for my student note, "High Caliber, Yet Under Fire: The Case for Deference to ATF Rulemaking." Professor Rosenblum can be reached at nr2267@nyu.edu or (212) 998-6009. I was a student in Professor Weissmann's Criminal Procedure course and, subsequently, served as his teaching assistant. He can be reached at aw97@nyu.edu or (917) 575-2171. I was a student in Professor Siffert's Trial and Appellate Advocacy class. He can be reached at JSiffert@lswlaw.com or (212) 921-8399. I was a research assistant for Professor Shane. He can be reached at pms9616@nyu.edu or (212) 998-6327.

Additionally, I took Judge Koeltl's Constitutional Litigation course and subsequently served as his teaching assistant. Judge Koeltl has offered to answer any questions you may have about my qualifications. He can be reached at John_G_Koeltl@nysd.uscourts.gov.

Thank you for your consideration. Please let me know if you require any further information.

Respectfully,

Tess Saperstein

TESS SAPERSTEIN
85 4th Ave., Apt. 7JJ, New York, NY 10003
(561) 886-8247 • ts4282@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., May 2023
Unofficial GPA: 3.567
Honors: Moot Court Board (journal equivalent), Competitions Associate Executive Editor
Wechsler Criminal Law Moot Court Competition, Semifinalist and Fourth Best Brief
Activities: High School Law Institute, Constitutional Law Coordinator and Speech and Debate Instructor
Teaching Assistant, Criminal Procedure, Professor Andrew Weissmann, (Fall 2022); Constitutional Litigation, Judge John Koeltl, (Spring 2023)
Research Assistant, Professor Peter Shane, (2022-23)
Publication: "Barred from Birthright: The Constitutional Case for American Samoan Citizenship" in *NYU Proceedings*

HARVARD UNIVERSITY, Cambridge, MA
A.B, *cum laude* in Government, May 2018
Honors Thesis: "The Things That Are Caesar's: Evangelical Voting in the 2016 Florida Republican Primary"
Activities: *Harvard Political Review*, Senior Covers Editor; *On Harvard Time*, Executive Producer
Publication: "In God We Trust: Reconciling Religiosity in a Secular Nation" in *Compass: A Journal of American Political Ideas*

EXPERIENCE

ARNOLD & PORTER, New York, NY
Associate, Fall 2023**;** ***Summer Associate,*** May-July 2022
Researched and drafted memos for matters in the Securities Enforcement & Litigation and Government Contracts practice groups and for pro bono matters relating to asylum applications and reproductive justice. Compiled federal cases presenting novel interpretations of products liability law for publication in a treatise.

PROFESSOR NOAH ROSENBLUM, NYU SCHOOL OF LAW, New York, NY
Research Assistant**,** August 2021 - January 2023
Provided research and citation support in bringing article on the antifascist roots of executive power to publication. Compiled sources and cite-checked Professor Rosenblum's PhD dissertation.

THE HON. DIANE GUJARATI, U.S. DISTRICT COURT, E.D.N.Y., Brooklyn, NY
Judicial Extern**,** August - December 2022
Researched subject-matter jurisdiction and drafted memo analyzing arguments on Social Security appeal. Observed court proceedings.

U.S. ATTORNEY'S OFFICE—EASTERN DISTRICT OF NEW YORK, New York, NY
Legal Intern, Civil Division, June - July 2021
Reviewed case records, conducted legal research, participated in moots, and edited briefs for appellate cases related to Social Security and immigration. Researched and wrote memo on SBA regulations for issuing PPP loans. Drafted interrogatories and document requests.

GIFFORDS: COURAGE TO FIGHT GUN VIOLENCE, Washington, DC
Engagement Manager, June - August 2020; ***Organizing Associate,*** February 2019 - June 2020
Oversaw Courage Fellowship program for 17-21 year-old activists, including application process and programming. Wrote action alerts summarizing legislation in state legislatures.

Name: **Tess Saperstein**
Print Date: **06/05/2023**
Student ID: **N14560876**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Kim A Taylor-Thompson			
Torts	LAW-LW 11275	4.0	B
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	B+
Instructor: Troy A McKenzie			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: The Supreme Court			
Instructor: Trevor W Morrison, Alison J Nathan			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Kenji Yoshino			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-
Instructor: Emma M Kaufman			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Trevor W Morrison, Alison J Nathan			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Resisting Contemporary Authoritarianism Seminar	LAW-LW 10041	2.0	A-
Instructor: Joseph Weiler, Amrit Singh Ms			
The Law of Democracy	LAW-LW 10170	4.0	B+
Instructor: Richard H Pildes			
Ethical and Legal Challenges in the Modern Corporation	LAW-LW 10387	3.0	A
Instructor: Helen S Scott, Karen Brenner			
Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A
Instructor: Andrew Weissmann			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Research Assistant	LAW-LW 12589	1.0	CR
Summer 2021 Research Assistant			
Instructor: Noah Rosenblum			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Litigation Seminar	LAW-LW 10202	2.0	A
Instructor: John G Koeltl			
Evidence	LAW-LW 11607	4.0	B+
Instructor: Daniel J Capra			
Labor Law	LAW-LW 11933	4.0	A
Instructor: Cynthia L Estlund			
Statutory Interpretation Seminar	LAW-LW 12252	2.0	A
Instructor: Jonah B Gelbach			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	57.0	57.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Directed Research Option A	LAW-LW 10737	2.0	A
Instructor: Noah Rosenblum			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B+
Instructor: Geoffrey P Miller			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Andrew Weissmann			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Roderick M Hills			
Federal Judicial Practice Externship	LAW-LW 12448	3.0	CR
Instructor: Michelle Beth Cherande, Alison J Nathan			
Federal Judicial Practice Externship Seminar	LAW-LW 12450	2.0	CR
Instructor: Michelle Beth Cherande, Alison J Nathan			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	72.0	72.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Trial and Appellate Advocacy Simulation	LAW-LW 10059	3.0	A-
Instructor: Reena Raggi, John S Siffert			
Moot Court Board	LAW-LW 11553	2.0	CR
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: John G Koeltl			
Property	LAW-LW 11783	4.0	A-
Instructor: Katrina M Wyman			
Criminal Securities and Commodities Fraud Seminar	LAW-LW 12117	2.0	A
Instructor: Raymond Joseph Lohier, Jr., Steven Peikin			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	84.0	84.0

Staff Editor - Moot Court 2021-2022
Competitions Associate Executive Editor - Moot Court 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU | LAW

ANDREW WEISSMANN
Professor of Practice

School of Law
Center on the Administration of Criminal Law
40 Washington Square South, 302A
New York, New York 10012

P: 212 998 6119

andrew.weissmann@nyu.edu

June 10, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

RE: Tess Saperstein, NYU Law '23

Dear Judge Matsumoto:

I write to recommend Tess Saperstein for a clerkship. At NYU School of Law, I taught Tess in my Criminal Procedure course and then worked with her the following year when she was my Teaching Assistant for that class. I cannot recommend her more highly as a future law clerk. I have no doubt that you would find her sharp as a whip, creative, diligent, efficient, and thorough. She is also a delight to work with and am confident she would be a valued and collegial addition to your chambers.

I met Tess in the Fall of 2021 in my course Criminal Procedure: Fourth, Fifth and Sixth Amendments. Tess was a consistently thoughtful participant in the class, and I was not at all surprised when she received an A (grades are given out blind). I also was a judge on one of her moot court competitions, and saw her exceptional ability to think through a legal issue and then forcefully advocate, with unusual presence, maturity, and suppleness. Based on this, and her clear enthusiasm for the course subject matter, she was my first choice to be my Teaching Assistant for the course the following year.

It was as a Teaching Assistant that I truly got to know Tess and see how remarkable a student she is. Tess was a true partner in the course. For instance, the first assignment I ask my Teaching Assistant to perform is to give me feedback on the course: what worked, what did not work, how it might be improved, and the like. Tess's comments were extraordinary. Her input displayed an unusual combination of being perceptive, sophisticated, forthright, and polite. She gave excellent suggestions about how to re-order certain material, how to give greater signposts, and where material could be cut. I took them all, save one, and then during the semester candidly told her that I regretted not having followed her advice on that one item. Her comments during the semester were equally helpful, letting me know after each class (as I had requested) what she thought had been particularly helpful, what could use greater emphasis, and the like.

Tess also helped me conduct several review sessions, going over hypothetical factual scenarios, in which students were called on to discuss how to analyze the facts and how they triggered various legal doctrines we had taught in the prior weeks. Tess handled various of the hypotheticals in each class; I had no hesitation in giving her this responsibility, which she performed with great aplomb, clearly going over the facts and how the law applied, and providing helpful guidance about how to analyze a factual situation to identify and correctly apply the law and evaluate grey areas.

Finally, Tess is a pleasure to deal with, and I have no doubt will work very well with other clerks, displaying collegiality and intellectual curiosity.

Please let me know if there is any further information I can provide about Tess. I can be reached by email at aw97@nyu.edu or 917-575-2171.

Respectfully,
Andrew Weissmann

NOAH A. ROSENBLUM
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June 5, 2023

RE: Tess Saperstein, NYU Law '23

Dear Judge:

I write in support of Tess Saperstein's application for a judicial clerkship in your chambers. Tess has tremendous legal acumen, superlative research and writing abilities, and a deep devotion to justice. Based on my familiarity with her work and my personal knowledge of her, I believe she will make a fantastic law clerk.

I first came to know Tess when I was looking for a research assistant to help with a project on the history of presidential administration. Research assistantships at NYU Law are prized and obtaining one can be competitive. Tess's reputation preceded her. As a new member of the NYU Law faculty, I canvassed my colleagues for advice about who to bring on as an assistant. One responded right away with Tess at the top of her list, noting that she had written one of the best exams in her class and had a particular facility for legal research and writing. Tess's accomplishment was especially impressive as she achieved it during the worst of the COVID pandemic, when instruction was entirely remote. This illustrates one of Tess's characteristic skills: her remarkable ability to master difficult legal concepts on her own with little guidance.

I soon had the opportunity to see Tess's prodigious talent for myself. For her first assignment, I asked her to help me respond to various source-related queries from law review editors about a recently accepted piece. Tess went far beyond my expectations: she annotated the editors' queries, identified and corrected errors in my argument, and researched additional citations to bolster my claims. I had expected to need several assistants for the project, but Tess did all the work herself.

I was so impressed that I asked Tess to stay on as my research assistant to take on a second, larger project in connection with my doctoral work. This assignment required a sophisticated understanding of the legal reasoning in several late 19th century removal cases and their effect on separation of powers law. Tess launched in with minimal instruction from me. She kept me updated with regular emails. And again, she produced simply first-rate work. Over the course of the assignment, I asked her to do a variety of tasks, including proofreading, assembling a bibliography, cite-checking, and reviewing legal analyses. She did it all with aplomb and

unerring accuracy. I was struck not only by her talent but also by her ability to deploy it without the need for much in the way of ongoing supervision.

On the basis of my familiarity with Tess's abilities, I agreed to supervise a research paper she proposed on court review of ATF rulemakings. The project grew from Tess's pre-law school experience working for Gabby Giffords, the former Congresswoman who has become a leading advocate against gun violence. In that capacity, Tess had become interested in the different regulatory tools available to address gun violence. After starting law school, Tess noticed that the Bureau of Alcohol, Tobacco, Firearms, and Explosives was, for the first time in its history, engaged in rulemaking with the aim of limiting the most deadly forms of gun violence. This, Tess realized, raised a host of legal questions on which federal courts had already divided. Tess came to me with a fully-formed and carefully articulated proposal to explore how courts should approach new ATF rulemakings.

The paper she produced is outstanding. It is the best article on court review of ATF rulemaking. And it makes more general contributions to administrative law, including how deference to agency expertise should interact with the rule of lenity and how courts should think about reviewing agency decisions that implicate criminal legal enforcement schemes. The note is a model of careful research and subtle argumentation. I expect it will be published and profitably relied on by judges, agency administrators, and advocates working to lessen gun violence.

Tess's strong legal research and writing skills are also evident from her writing sample, making the case for American Samoan citizenship, which I reviewed. It is, like her other work, top-notch: crisp, persuasive, smart, and deeply researched. It builds its argument through a logical progression of interlocking paragraphs, headed by well-crafted topic sentences, distilling and applying legal rules along the way. It is as clear and graceful as the memos she produced for me as an RA and the research paper she wrote for me as a student.

Tess's application and dedication are not limited to her academic work. She has thrived in some of the most competitive and demanding extra-curricular placements NYU Law offers, including at the U.S. Attorney's Office for the Eastern District of New York and the chambers of a federal judge in Brooklyn. And she has put her considerable skills to use as a coach for one of the Law School's Moot Court teams, a successful Moot Court competitor, and an instructor for high school speech and debate. How Tess spends her time is a testament to her character: she is not only talented and thoughtful but also organized, values-driven, generous, and engaged.

As a former judicial clerk myself, I well remember the crucial role clerks play in chambers and the need judges have for legal talent. Tess has the intellect, ability, and attention to detail necessary to make a meaningful contribution from her first day. And she has the personality of an ideal chambers colleague—conscientious, thoughtful, dedicated, and proactive.

In other words, Tess is a sure bet. She has my highest recommendation. If you have any questions or concerns, or require any additional information, please do not hesitate to reach out.

Sincerely,

Noah A. Rosenblum

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June 8, 2023

Your Honor,

I am writing to recommend Tess Saperstein's application for a judicial clerkship.

Tess was enrolled as a student in the Trial and Appellate Advocacy class that I taught with Hon. Reena Raggi during the spring semester of 2023.

I have only the best things to say about Tess, but because our class is a "simulation" course, I cannot speak to her academic skills. That said, I note that Hon. John G. Koeltl gave her an A in his class on Constitutional Litigation in the fall of 2022, and he has given me permission to state that he thinks highly of her. He also told me that I may say that he would be happy to talk with you about her.

Judge Raggi's and my Trial and Appellate Advocacy class covers virtually every aspect of a case from the prosecution and defense point of view, starting with the case "intake" through an oral argument on appeal. We examine the goals and ethical considerations at the start of a representation and explore the skills required to persuade a jury of your client's case. Students act out how a prosecutor and defense lawyer prioritize their goals when initially learning the facts and proceed to perform opening statements, witness examinations and summations. All the exercises are performed in an Eastern or Southern District courtroom, and the semester ends with appellate arguments in the Second Circuit courtroom. The students critique each other and are critiqued by Judge Raggi and me. Tess was an effective advocate, accepted critiques, and collaborated well with her classmates.

I have been teaching this class for 41 years. Every now and then I have a student who strikes me as possessing an extraordinary mind and who is an original thinker –someone with whom I would like to stay in touch after graduation. Tess is one of those people. Tess is mature and direct--someone who thinks beyond the obvious and asks probing questions. She is organized, sincere and thorough. She is obviously smart and unafraid to express her own views, but she also is unafraid to rethink and probe more deeply. She has an instinct to learn and capacity to grow. She excelled in each exercise and seized the opportunity to improve on her first performance when offered the chance. This character trait is underscored by Judge Koeltl's observation that she accepted his offer to be the TA for the spring semester in order to experience the course again, even though she did not earn law school credit.

Tess has a gravitas beyond her years that elicited the students' and professors' respect. I have every confidence that Tess will excel as a law clerk and do well in the intimate atmosphere of a federal judge's chambers. I recommend her highly and without reservation.

Respectfully,

John S. Siffert

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A private university in the public service

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Peter Shane
Distinguished Scholar in Residence and Adjunct Professor of Law, NYU Law
Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus, Ohio State University

June 9, 2023

Dear Judge:

I am pleased to provide this enthusiastic letter of recommendation on behalf of Tess Saperstein, a 2023 graduate of NYU Law, who has applied to you for a clerkship. Given her work as my research assistant during this past academic year, I can assure you not only of Ms. Saperstein's strong intellect and work ethic, but also that she is an exceptionally mature and personable young professional who would work well as part of the small team that makes up a judge's chambers. Having clerked myself (albeit in a distant decade), I well understand how a judge depends on the skill and character of every member of his or her team.

The project for which I engaged Ms. Saperstein's assistance was an unusual one. Last summer and fall, I set out to produce and host a podcast on how law shapes the office of the American presidency and the exercise of executive power. Separation of powers law has been the focus of much of my research and writing for the last four decades. I went looking for an RA who could primarily do two things for me. The first was to produce short summaries of recent written work by several of my academic interviewees, to help me map out the questions I wanted to pose on each topic. The second one was to create and manage a Twitter account on behalf of the podcast. In looking for a student well-positioned to execute both these tasks, I was hoping to find someone with an outstanding academic record, excellent writing ability, a deep interest in public affairs, and experience in digital production. Among the applicants, Ms. Saperstein was the standout in each of these respects, and her performance consistently met my high expectations. She beat every deadline I set, provided clear and jargon-free summaries, and showed great initiative in providing thoughtful "teasers" for each episode of the six-episode series.

Although I have not supervised Ms. Saperstein in an independent research project, I have read with interest and pleasure her essay, "Barred from Birthright: The Constitutional Case for American Samoan Citizenship," written for "NYU Proceedings," an online journal produced by NYU Law's Moot Court Board. The clear structure, solid research, and well-crafted prose of that work all bode well for her potential contributions as a law clerk. I would also add that any judge would likewise be well-served by Ms. Saperstein's capacities for project organization and effective time management, exemplified both by her work for me, but also by her work in helping to organize the school's moot court competitions. She managed to accomplish all of this, while also teaching speech and debate to high schoolers as part of the NYU High School Law Institute, an important and creative endeavor run by NYU law students.

In short, I believe Tess Saperstein possesses the initiative, temperament, intellectual skill, and maturity to prove an exceptional judicial law clerk. I hope you will give her your most serious consideration.

Sincerely,

Peter M. Shane
Distinguished Scholar in Residence and Adjunct Professor of Law, NYU Law
Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus, Ohio State University

Writing Sample 1

As part of the Herbert Wechsler National Criminal Law Moot Court Competition, my team submitted an appellate brief on behalf of the petitioner, Joemar Chase. The issue arises in the midst of the COVID-19 pandemic when the fictional Western District of Erie resumed in-person proceedings. Shortly before she was scheduled to testify, the government's key witness, Agent Travis, tested positive for COVID-19. Rather than suspending the trial while Agent Travis was in quarantine, the prosecutor proposed that the trial proceed as scheduled, with Agent Travis providing her testimony over Zoom. Mr. Chase made a timely objection, but the trial judge chose to proceed with the Zoom testimony.

The issue for the competition was whether Mr. Chase's Confrontation Clause rights were violated. In the first part of the brief, my moot court partner argued that the Confrontation Clause mandates physical, face-to-face confrontation of witnesses, as per *Crawford v. Washington*, 541 U.S. 36 (2004). In the second part of the brief, I argued that Mr. Chase's Confrontation Clause rights were violated regardless of whether the categorical rule in *Crawford v. Washington,* or the balancing test in *Maryland v. Craig,* 497 US. 836 (1990), was applied. Attached is the portion of the argument section of the brief for which I was solely responsible and for which I served as the sole author.

II. MR. CHASE'S RIGHT TO CONFRONTATION WAS VIOLATED UNDER *MARYLAND V. CRAIG*

In establishing *Maryland v. Craig*'s balancing test, the Court acknowledged the importance of face-to-face confrontation, starting from the presumption that it may not be easily disregarded. 497 U.S. 836, 850 (1990). Therefore, the first prong of the balancing test requires that the court establish that the denial of face-to-face confrontation is "*necessary* to further an important public policy." *Id.* at 845 (emphasis added). The necessity inquiry must be case specific, focus on the needs of the individual witness, and consider whether accommodations may be made that allow face-to-face confrontation to be preserved. *Id.* at 856 (stating that denial of face-to-face confrontation is unnecessary if the well-being of the child witness could be protected by permitting the witness to testify in less intimidating surroundings, but with the defendant present). Because the Thirteenth Circuit misapplied *Craig,* the question is subject to *de novo* review. *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563 (2014) (decisions on questions of law are reviewable *de novo*).

A. Video Testimony Was Not Necessary to Further an Important Public Policy

Face-to-face confrontation may only be sacrificed if it is "necessary to further an important public policy." *Craig,* 497 U.S. at 845. *Craig* was a unique case in which the public policy interest at stake and the Confrontation Clause were irreconcilable. *Id*. at 856 ("Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma."). The *Craig* Court determined that the statute permitting one-way testimony for child witnesses in abuse cases was constitutional because the necessity inquiry was built into the statute. *Id.* (stating that the statute's requirement of an individualized finding that confronting the defendant face-to-face

would cause such emotional distress as to prevent the alleged victim from "reasonably communicat[ing]" satisfies constitutional standards) (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989)). If this finding were made, then the two interests—protecting the child from trauma in child abuse cases and the defendant's right to confrontation—would stand in direct opposition. In the present case, neither the trial court nor the Thirteenth Circuit made such a finding. The lower court failed to properly consider the necessity prong of the *Craig* balancing test, merely stating that face-to- face confrontation could be foregone "if a strong public policy reason *existed* to permit the video testimony, and if there were sufficient indicia of reliability of the testimony." (R. at 5) (emphasis added). This mistake was not remedied, or even recognized, by the Thirteenth Circuit. Instead, the Thirteenth Circuit glossed over this essential inquiry, stating that *Craig* permits video testimony merely "when a strong public policy interest is *at stake*, and there are strong indicia that the testimony is reliable." (R. at 11) (emphasis added).

i. The Lower Court Did Not Consider the Alternatives to Video Testimony Which Would Have Preserved the Confrontation Right

Craig's defining feature is that it requires the weighing of competing interests. 497 U.S. at 848 (stating that competing interests may warrant dispensing with confrontation at trial if the interests are closely examined). However, the lower court abdicated that responsibility by uncritically accepting the prosecutor's proposal to use Zoom. (R. at 5). To properly determine whether video testimony was "necessary," the court would have had to consider the alternatives. *United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir. 2018) (explaining that *Craig's* necessity requirement was not met because there were alternatives, such as a continuance, which would have preserved the defendant's right to physical face-to-face confrontation).

Had the necessity element been properly considered, the court would have had to weigh the option of granting a 14-day continuance until Agent Travis completed her quarantine. (R. at 5); *see also Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 838 (Mass. 2021) (finding an abuse of discretion by a trial judge who, in the midst of the COVID-19 pandemic, denied defendant's motion to continue until the trial may be held in-person). Alternatively, the lower court could have avoided a continuance altogether, or reduced its length to less than a week, if the order of the witnesses was rearranged. (R. at 18). Unlike in *Craig,* in which the public policy interest and right to confrontation were diametrically opposed, in the present case, there were alternatives to video testimony that would have allowed the court to uphold both the public policy interest and Mr. Chase's Sixth Amendment right. (R. at 18).

ii. The Specific Public Policy Interest Was Not Clearly Established

Justice Scalia's dissent in *Craig* further undermines the Respondent's showing of necessity by calling into question the public policy interest at stake. In *Craig,* Justice Scalia noted that the public policy interest wasn't protecting child abuse victims, as the government claimed; rather, the true interest was admitting evidence to get a conviction. 497 U.S. at 867 (Scalia, J., dissenting) ("That is not an unworthy interest, but it should not be dressed up as a humanitarian one."). If the state interest were simply preventing the spread of COVID-19, then the state could have asked the court to suspend the trial or utilized the testimony of one of the other agents who was involved in the investigation of the case. *Id.* ("Protection of the [public policy] interest—as far as the Confrontation Clause is concerned—is entirely within [the state's] control."). However, the state was concerned that suspending the trial would "risk jurors forgetting testimony," so it prioritized its primary interest: obtaining a speedy conviction. (R. at 5). Claims that video testimony should be utilized in aid of judicial efficiency are particularly

suspect when the potential delay can be attributed to the party that proposed the use of video testimony. *People v. Jemison*, 952 N.W.2d 394, 400 (Mich. 2020) (stating the prosecution could not deprive a criminal defendant of their confrontation rights by using out-of-state analysts to save money and then cite cost-savings as a justification for the use of video testimony).

Furthermore, in determining what constitutes a strong public policy reason for compromising the defendant's right to confrontation, the *Craig* Court found persuasive that "a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases . . . ." 497 U.S. at 853. This indicated widespread agreement that protecting child abuse victims was sufficiently important to outweigh a defendant's right to confrontation. *Id.* The *Craig* Court also pointed to prior precedent in which it prioritized the prevention of child sex abuse over the invocation of constitutionally protected rights. *Id.* at 852 (citing *New York v. Ferber*, 458 U.S. 747 (1982), in which the Court found that the interest in preventing the dissemination of child pornography was sufficiently weighty to supplant the First Amendment interest). No such precedent or widespread agreement exists with regards to how courts should balance a defendant's Sixth Amendment rights against public health concerns. In fact, it has been the subject of significant disagreement. State courts have adopted varying policies regarding criminal trials and given discretion to local jurisdictions or the presiding judge. *See e.g.,* SUP. CT OF ARIZ., ADMIN. ORD. NO. 2021-187, IN THE MATTER OF: AUTHORIZING LIMITATION OF COURT OPERATIONS DURING A PUBLIC HEALTH EMERGENCY AND TRANSITION TO RESUMPTION OF CERTAIN OPERATIONS (2021) (authorizing presiding superior court judges to determine procedures for criminal proceedings); JUD. COUNCIL OF CAL., STATEWIDE ORDER BY HON. TANI G. CANTIL-SAKAUYE (2020) (permitting the use of remote technology for jury trials "when appropriate").

In the rare cases in which remote testimony was permitted in criminal trials during the pandemic and without the defendant's consent, courts have found that the defendant's right to confrontation was violated. *See e.g.*, *United States v. Casher*, No. 19-65-BLG-SPW, 2020 US Dist. LEXIS 106293, at *7 (D. Mont. June 17, 2020) (underlying medical issues, which placed the witness at high risk of complications if he were to contract COVID-19, were not sufficient to justify video testimony); *United States v. Kail*, No. 18-CR-00172-BLF-1, 2021 U.S. Dist. LEXIS 58516, at *3 (N.D. Cal. Mar. 26, 2021) (requiring witness to testify in-person despite "medical hardship"); *cf. People of the Virgin Islands v. Warner*, No. ST-17-CR-031, 2020 V.I. LEXIS 88, at *5 (V.I. Nov. 2, 2020) (at-risk witness who would have needed to travel internationally was permitted to testify via videoconference).

In applying *Craig's* balancing test prior to the COVID-19 pandemic, courts have typically found that a witness's medical condition or illness necessitated the use of video testimony only in the direst circumstances and when the witness's condition was permanent. *Bush v. State*, 193 P.3d 203, 214 (Wyo. 2008) (witness who was suffering from congestive heart failure and chronic renal failure was permitted to testify via two-way teleconference). In *Horn v. Quarterman*, the court permitted a witness with terminal liver cancer to testify from his hospital via two-way closed-circuit television, but required an attorney for the state and defense counsel to be physically present at the hospital during the testimony. 508 F.3d 306, 317-18 (5th Cir. 2007). Anything short of this high standard has generally been deemed an insufficient reason to compromise the defendant's Sixth Amendment right. *See State v. Rogerson*, 855 N.W.2d 495, 507 (Iowa 2014) (suffering "severe injuries" from a car crash and living "a significant distance" from the court does not satisfy *Craig's* necessity prong). The Ninth Circuit held that video testimony should not have been permitted for a witness who was unable to travel during her

pregnancy because it was only "a temporary disability." *Carter*, 907 F.3d at 1208 (stating a continuance should have been granted for two months, which was the remaining length of the witness's pregnancy). By contrast, Agent Travis only had to quarantine for 14 days, with the possibility that she would have been available even sooner if she was tested earlier and deemed not contagious (R. at 5, 19).

Although some state courts have held that a witness's exposure to COVID-19 reached the level of necessity mandated by *Craig,* those courts' decisions were based on the uncertainty that surrounded COVID-19 early in the pandemic. *State v. Tate*, No. 03-CR-19-289, 2022 Minn. App. LEXIS 1, at *21 (Minn. Ct. App. Jan. 3, 2022) (stating that, in November 2020, when the exposure took place, infection rates were high, hospitalizations had increased, and there was no way to know when the witness would become available). Despite concerns early in the pandemic, courts have found that when there was a window of opportunity, in-person testimony was preferable to video testimony. *Casher*, 2020 U.S. Dist. LEXIS 106293, at *6 (citing decreasing COVID-19 cases in June 2020 as evidence that in-person testimony should take place). Writing in June 2021, the Nebraska Supreme Court noted that its prior determination to permit video testimony in July 2020 was "time-sensitive" and had limited precedential weight because little was known about the disease at the time. *State v. Comacho*, 960 N.W.2d 739, 755 (Neb. 2021) ("[W]ays to limit [COVID-19's] spread [were] much more limited [in July 2020] than at present day or, presumably, than it will be in the future.").

By May 2021, when Agent Travis became infected, vaccines were widely available, and infection and hospitalization rates were quickly falling. Christina Morales & Isabella Grullón Paz, *Coronavirus Cases and Deaths in the United States Drop to Lowest Levels in Nearly a Year*,

N.Y. TIMES (May 23, 2021), https://www.nytimes.com/2021/05/23/us/covid-cases-vaccinations-united-states.html. Given that Agent Travis was asymptomatic at the time she tested positive, it was unlikely she would need more than the recommended 14 days to test negative. Seungjae Lee et al., *Clinical Course and Molecular Viral Shedding Among Asymptomatic and Symptomatic Patients With SARS-CoV-2 Infection in a Community Treatment Center in the Republic of Korea*, 180 JAMA INTERNAL MED. 1447, 1450-51 (2020) (finding 81.9 percent of asymptomatic COVID-19 patients remained asymptomatic and that asymptomatic patients tested negative sooner than symptomatic patients); *see also Comacho*, 960 N.W.2d at 755 ("[I]t is important to our determination of necessity that, in this case, the witness had actually tested positive for COVID-19 and was experiencing symptoms.").

B. Video Testimony Is Unreliable

Even if the necessity prong had been satisfied, *Craig* also requires that, in the absence of face-to-face confrontation, "the reliability of the testimony is otherwise assured." 497 U.S. at 850. *Craig* was a unique case in which requiring in-person confrontation would have *undermined* the truth-seeking function of face-to-face confrontation because the abused child would have been afflicted with such serious emotional distress that they would have been unable to testify. *Id.* at 856-57 ("[W]here face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal."). Unlike the typical case in which "face-to-face confrontation enhances the accuracy of factfinding," the child's testimony was made more reliable through the use of video testimony. *Id.* at 846, 857. This unique calculus does not apply to the present case

since there has been no suggestion that Agent Travis would be more reliable over video than in person.

Furthermore, video testimony is inherently less reliable than in-person testimony because it impedes the jury's ability to engage in its core duties by observing the witness's "demeanor, nervousness, expressions, and other body language . . . ." *United States v. Hamilton*, 107 F.3d 499, 503 (7th Cir. 1997). Shifts in body language are more difficult—if not impossible—to observe when a witness is visible only from the torso and above. *Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002) ("[V]ideo conferencing may render it difficult for a factfinder in adjudicative proceedings to make credibility determinations and to gauge demeanor."). Jurors are unable to make fully informed credibility determinations if they cannot observe the witness's body language. Sara Landström et al., *Children's Live and Videotaped Testimonies*, 12 LEGAL & CRIMINOLOGICAL PSYCH. 333 (2007) (finding that individuals who watched live testimony were better than chance at assessing the truthfulness of the speaker, whereas those who observed the speaker over video were not). Even subtle nonverbal cues, such as the maintenance of eye contact, impacts jurors' assessments of honesty. Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1294 (2021).

In *Craig,* the jury was in a better position to determine the witness's credibility because, unlike the present case in which only the witness's face was visible, (R. at 20), the judge, jury, and defendant in *Craig* were able to view "the demeanor (and body) of the witness as [they] testifie[d]." 497 U.S. at 851. Additionally, in *Craig,* the prosecutor and defense counsel were in the same room as the witness, so the jury could at least determine if the witness was avoiding the

gaze of their questioner. *Id.* at 841-42. In contrast, in the present case, the jury was unable to determine whether Agent Travis was making—or specifically avoiding— eye contact with anyone. (R. at 20).

Not only does video testimony hinder the jury's ability to evaluate non-verbal cues, but it can also impede comprehension of the information being communicated. Even if the technology had functioned perfectly and the video had been transmitted synchronously, the psychological effects of receiving information from someone who is not physically present rendered Agent Travis's testimony less memorable and, therefore, less reliable. Benjamin Rich Zendel et al., *Memory Deficits for Health Information Provided Through a Telehealth Video Conferencing System*, 13 FRONTIERS PSYCHOLOGY 1, 5 (2021) (finding study participants who received health information via video conferencing recalled a significantly lower number of details than their counterparts who received information in person). Additionally, the presence of hand gestures compliments speech in such a way that observing gestures enhances listener comprehension. James E. Driskell & Paul H. Radtke, *The Effect of Gesture on Speech Production and Comprehension*, 45 HUM. FACTORS 445, 450 (2003) (finding that, even when controlling for speech production, the use of hand gestures increased the listener's understanding of the speaker). Since only Agent Travis's face was visible, (R. at 20), the jury would have lacked this critical aid that humans rely upon in day-to-day interactions. Judith Holler et al., *Do Iconic Hand Gestures Really Contribute to the Communication of Semantic Information in a Face-to-Face Context?*, 33 J. NONVERBAL BEHAV. 73, 81 (2009) (finding speech and hand gestures were less communicative when presented over video instead of in person).

III. MR. CHASE'S RIGHT TO CONFRONTATION WAS VIOLATED UNDER *CRAWFORD V. WASHINGTON*

Although her face was visible on a screen in the courtroom for part of her testimony, Agent Travis was not "face-to-face" with Mr. Chase within the meaning of the Sixth Amendment. Of all the circuits to consider the argument, only the Second Circuit has held that video testimony satisfies the "face-to-face" requirement. *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). Despite 20 years of technological advances, most courts that consider the issue have explicitly rejected an interpretation of the Sixth Amendment in which video testimony is equivalent to face-to-face confrontation. *See e.g.*, *United States v. Yates*, 438 F.3d 1307, 1312-13 (11th Cir. 2006) (rejecting the *Gigante* approach); *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) ("[A] 'confrontation' via two-way closed circuit television is not constitutionally equivalent to a face-to-face confrontation."). In rejecting the *Gigante* approach, these courts recognized that there is a fundamental difference between virtual and live testimony. *Carter*, 907 F.3d at 1207 ("There are also important practical differences between face-to-face confrontation and virtual confrontation."); *Rogerson*, 855 N.W.2d at 504 ("[W]e do not believe two-way video conferencing is constitutionally equivalent to the face-to-face confrontation envisioned by the Sixth Amendment."). Because video testimony is not equivalent to face-to-face confrontation, *Crawford* imposes a categorical bar on its use as a substitute at trial. *Jemison*, 952 N.W.2d. at 401 (applying *Crawford,* defendant's constitutional rights were violated by the use of video testimony).

A. Video Testimony Is Not Equivalent to Face-to-Face Testimony

In addition to serving the truth-seeking function, the requirement of face-to-face confrontation serves a symbolic purpose. *See* Order of the Supreme Court, 207 F.R.D. at 94

("[A] purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant's presence—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image."). Requiring the witness to enter the courthouse and submit to questioning impresses upon them the importance of the testimony they will offer. *Vazquez Diaz*, 167 N.W.3d at 347. The solemnity and weightiness of the proceedings is lost when testimony that could condemn a person to decades in prison can be offered from one's bedroom. *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) ("[E]ven in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."). In recognition of the symbolic importance of in-person testimony, some states have recommended or required that courts obtain the consent of the defendant before using videoconferencing technology in criminal proceedings. *See* DAVID SLAYTON, TEX. OFF. CT. ADMIN., *Jury Trials During the COVID-19 Pandemic* (2020) (recommending virtual criminal jury proceedings occur only with appropriate waivers and consent from the defendant); SUP. CT. OHIO TASK FORCE, *Report & Recommendations of the Task Force on Improving Court Operations Using Remote Technology* (2021) (recommending courts obtain consent in order to conduct remote jury trial procedures).

i. The Witness's Face Was Obscured During Her Testimony

Even if video testimony could provide the face-to-face confrontation mandated by the Sixth Amendment, certain functions of the video conferencing platform reduced the witness's visibility, thereby undermining any argument that the key elements of in-person testimony were replicated over Zoom. (R. at 6). Whenever a document was shared with the witness, Agent Travis's face "appeared visible only as a small square in the upper right-hand corner of the

screen." *Id.* Her face remained minimized while she spoke. *Id.* The Thirteenth Circuit's acceptance of Agent Travis's video testimony was based on the presumption that the testimony was "visible to all in the courtroom." (R. at 5). However, once her face was minimized, it is unlikely that anyone in the courtroom would have been able to observe her reactions to the documents or any changes in her demeanor. (R. at 20). If Mr. Chase was unable to see the witness during her testimony, then his right to face-to-face confrontation was violated. *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988) (placing a screen between the witness and the defendant, so that the defendant could hear, but only dimly see the witness, amounted to a Sixth Amendment violation).

Nothing in the record indicates how many documents the prosecutor shared with Agent Travis nor how long her face was minimized throughout the testimony. (R. at 6). The government stated that Agent Travis provided "crucial testimony" to their case (R. at 5). However, for an unknown period of time, everyone in the courtroom would have been severely impaired in their ability to see and evaluate Agent Travis' demeanor as she testified. (R. at 6). The inability to see the witness's face during her testimony undermines the jury's core function. *Mattox v. United States,* 156 U.S. 237, 242-43 (1895) (stating the primary goal of the Confrontation Clause is to allow the jury to determine whether the witness is worthy of belief).

ii. The Witness Was Not Required to Confront Mr. Chase

Crawford emphasized that the "only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69. This is based on a long-held principle that has been repeatedly affirmed by the Court: it is more difficult to lie about someone in their presence than behind their back. *Coy*, 487 U.S. at

1019; *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (stating there are few subjects in which the Court has been more consistent than in its understanding of the right of confrontation and cross-examination as fundamental to a fair trial). This goal is not served if there is no way to ensure that the witness could even see Mr. Chase. Nothing prevented Agent Travis from avoiding Mr. Chase's gaze by selecting "speaker view," thereby permitting her to look only at her own face during her testimony. (R. at 20). Although witnesses aren't required to look the defendant in the eye during their testimony, it is essential to the jury's credibility determination that they be able to "draw [their] own conclusions" if the witness appears to be avoiding the defendant's gaze. *Coy*, 487 U.S. at 1019. By testifying over Zoom, Agent Travis could have created greater emotional distance between herself and Mr. Chase by minimizing his screen, without the jury's knowledge. *Vazquez Diaz*, 167 N.E.3d at 849 (warning that a witness's ability to avoid looking at the defendant would allow them to create emotional distance from the defendant, unbeknownst to the triers of fact).

B. The Witness Was Not Subject to Adequate Cross-Examination

Even if the video testimony technically classified as "face-to-face" confrontation, Mr. Chase's rights were violated because the witness wasn't subject to adequate cross examination. In rejecting *Roberts*' balancing test, *Crawford* emphasized that the ultimate goal of the Confrontation Clause is to ensure reliability of testimony through procedural guarantees. 541 U.S. at 62. This procedural guarantee is not possible when it is subject to the many technical problems that can—and do[1]—arise when using video testimony.

[1] In a Department of Justice study of video testimony proceedings, 29 percent of court staff reported that the use of video teleconferencing equipment caused a "meaningful delay" in their ability to proceed with their daily responsibilities. DEPT. OF JUST. & EXEC. OFF. FOR IMMIGR. REV., *Legal Case Study Summary Report* 23 (2017). As

The Thirteenth Circuit stated that there were times during Agent Travis's testimony in which her "internet at home became unstable," she "had trouble hearing questions," and there were "sound transmission delays." (R. at 5-6). Nothing in the record indicates how frequently this occurred, whether the problems were ultimately resolved, or if they continued throughout the entirety of her testimony. Even if Agent Travis ultimately heard and responded to questions, the fact that there were audio and visual delays during her testimony may have skewed the jury's ability to evaluate her credibility. Elena Bild et al., *Sound and Credibility in the Virtual Court*, 45 LAW & HUM. BEHAV. 481, 492 (2021) (finding low quality audio systematically led to poorer memory of factual evidence and reduced weighing of evidence in decision-making).

In addition to aiding the crucial requirement that the factfinder observe the witness's demeanor, in-person testimony guarantees that the witness is not being coached, influenced, or improperly referring to documents during their testimony. *Hamilton*, 107 F.3d at 503. In recognition of this potential risk, the Federal Rules of Civil Procedure require courts to employ "appropriate safeguards" whenever remote testimony is offered. FED. R. CIV. P. 43(a). The Advisory Committee stated that these safeguards must include measures "that protect against influence by persons present with the witness." FED. R. CIV. P. 43(a) Notes of Advisory Committee on 1996 Amendments. Nonetheless, no safeguards were employed to ensure that the witness was alone while testifying and not receiving private messages coaching her on her answers. (R. at 20).

a result of these findings, the report recommended that video conferencing technology be used only for procedural matters. *Id.*

CONCLUSION

Constitutionally guaranteed rights cannot be sacrificed in favor of administrative convenience. Although the COVID-19 pandemic has caused significant disruptions to society, it does not give the government *carte blanche* to chip away at Sixth Amendment protections. For the foregoing reasons, the judgment of the Court of Appeals for the Thirteenth Circuit should be reversed.

Writing Sample 2

"Barred from Birthright: The Constitutional Case for American Samoan Citizenship"

The enclosed article was published on November 3, 2022, in *NYU Proceedings*, the online journal for NYU's Moot Court Board. The article was adapted from a mock petition for certiorari for *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021), which I wrote for Judge John Koeltl's Constitutional Litigation course.

Unlike those born in any other United States territory, American Samoans are saddled with the ambiguous legal status of "nationals, but not citizens, of the United States." American Samoans have repeatedly sued, arguing that they are entitled to birthright citizenship. However, the Court of Appeals for the District of Columbia and the Tenth Circuit have denied their claims, relying on the Insular Cases, a series of early twentieth century Supreme Court decisions dealing with territories acquired as a result of the Spanish-American War. Nonetheless, the modern Court has repeatedly expressed its reluctance to extend the logic of the Insular Cases because of their racist underpinnings. This Contribution argues for the Court to overturn the Insular Cases and grant American Samoans birthright citizenship.

For over a century, the United States government has branded American Samoans with a mark of inferiority. Despite owing "permanent allegiance" to the United States,[1] American Samoans are designated "nationals, but not citizens, of the United States at birth."[2] Unlike those born in every other U.S. territory, who have been granted birthright citizenship by Congress,[3] American Samoans are singled out through this anomalous legal status. As a result, they are systematically denied the rights that are guaranteed to U.S. citizens, such as voting in

[1] 8 U.S.C. §§ 1101(21), (22).
[2] 8 U.S.C. § 1408(1).
[3] Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 Hastings Const. L.Q. 71, 71–72 (2013).

state or federal elections,[4] running for state or federal office,[5] or serving on juries.[6] In 2012[7] and 2018,[8] American Samoans sued, asking the courts to deem unconstitutional the statute that relegates them to second-class status. Both the United States Court of Appeals for the District of Columbia Circuit[9] and the Tenth Circuit[10] denied their requests, stating that the infamous *Insular Cases* controlled the issue by establishing that citizenship can only be extended via congressional fiat. However, the Supreme Court recently expressed a desire to revisit the *Insular Cases* and whether their racist and outdated imperialist logic has any role in modern constitutional jurisprudence. In *United States v. Vaello Madero*, the Court held that the equal-protection component of the Fifth Amendment's Due Process Clause does not require Congress to extend Social Security benefits to residents of Puerto Rico.[11] In his concurrence, Justice Gorsuch stated that "[t]he flaws in the Insular Cases are as fundamental as they are shameful. . . . [T]hey have no home in our Constitution or its original understanding."[12] The Supreme Court should right this century-old wrong by overturning the *Insular Cases* and granting American Samoans birthright citizenship.

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In the wake of the United States' acquisition of territory during the Spanish-American War, the Supreme Court decided a series of cases, known as the *Insular Cases,* which addressed whether "the Constitution, by its own force, applies in any territory that is not a

[4] *See, e.g.,* Utah Const. art. IV, § 5; Utah Code Ann. § 20A-2-101(1)(a); Haw. Const. art. II, § 1.
[5] *See, e.g.,* Utah Code Ann. § 20A-9-201(1); Wash. Const. art. III, § 25; U.S. Const. art. I, § 2.
[6] *See, e.g.,* Utah Code Ann. § 78B-1-105; Wash. Rev. Code § 2.36.070; 28 U.S.C. § 1865(b)(1).
[7] Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013).
[8] Fitisemanu v. United States, 426 F. Supp. 3d 1155 (D. Utah 2019).
[9] Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015).
[10] Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021).
[11] 142 S. Ct. 1539 (2022).
[12] *Id.* at 1554 (Gorsuch, J., concurring).

State."[13] The *Insular Cases* addressed the applicability of certain portions of the Constitution in this context, such as the Uniformity Clause,[14] the Export Clause,[15] and jury rights.[16] The *Insular Cases* established a theory of "territorial incorporation" in which the Constitution "applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories."[17] This was not based on constitutional doctrine, but on practical considerations related to the governance of newly acquired territory. The *Insular* Court stated these concerns explicitly, warning that "it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States."[18]

However, after ceding sovereignty in 1900, American Samoans initially believed that they had become United States citizens.[19] After discovering that they were not classified as such, American Samoans expressed their desire for citizenship to the American Samoan Commission which was established by Congress to make recommendations regarding the governance of the territory.[20] The Commission unanimously agreed to recommend that they be granted full citizenship.[21] In response to the Commission's recommendation, legislation was repeatedly introduced in Congress between 1931 and 1937 which would have extended citizenship to

[13] Boumediene v. Bush, 553 U.S. 723, 756 (2008).
[14] *See* Downes v. Bidwell, 182 U.S. 244 (1901).
[15] *See* Dooley v. United States, 183 U.S. 151 (1901).
[16] *See* Balzac v. Porto Rico, 258 U.S. 298 (1922); Rassmussen v. United States, 197 U.S. 516 (1905), *overruled on other grounds by* Williams v. Florida, 399 U.S. 78 (1970).
[17] *Boumediene*, 553 U.S. at 757.
[18] *Downes*, 182 U.S. at 279–80.
[19] Reuel S. Moore & Joseph R. Farrington, *The American Samoan Commission's Visit to Samoa, September-October 1930*, at 53 (1931) ("After the American flag was raised in 1900 the people thought they were American citizens.").
[20] *See id.* at 53 (describing how one of the two chairmen of the Mau, a Samoan group, told the Commission that they wanted citizenship).
[21] The American Samoa Comm'n, 71st Cong., The American Samoa Comm'n Rep.268 (1931).

American Samoa.[22] However, the legislation failed every time, with members of Congress expressing concerns that they would be required to "'take care' of people from a 'foreign land' while millions of Americans remain[ed] unemployed and in precarious economic situations."[23] Although the Senate unanimously passed legislation to recognize American Samoans as citizens, debates in the House repeatedly devolved into declarations of racial inferiority.[24] Members of Congress described American Samoans as "absolutely unqualified to receive [citizenship]," "poor unsophisticated people," and unable "to appreciate the privilege [of citizenship]."[25]

The Petitioners in *Fitisemanu v. United States*,[26] John Fitisemanu, Pale Tuli, and Rosavita Tuli have experienced firsthand the many burdens of being denied birthright citizenship as a result of American Samoa's anomalous legal status. In Utah, where they reside,[27] state laws reserve numerous employment opportunities specifically for U.S. citizens or give preference to citizens in the hiring process.[28] The Petitioners' unique status as American Samoans also imposes direct economic burdens as well because they are statutorily barred from receiving state-based public assistance.[29]

Mr. Tuli is also unable to sponsor his aging parents, who are foreign nationals, so that they may relocate to his home state of Utah.[30] He also wished to "pursue a career as a police

[22] Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960*, 60 Am. J. of Legal History 311, 345 (2020).
[23] *Id.* at 341.
[24] Brief for Samoan Federation of America, Inc. as Amicus Curiae Supporting Plaintiffs-Appellees, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021) (No. 1:18-cv-00036-CW) 2020 WL 2490115, at *18–21.
[25] *Id.* at *20.
[26] Petition for Writ of Certiorari, *Fitisemanu v. United States* (No. 21-1394) (denied Oct. 17, 2022).
[27] Complaint for Declaratory and Injunctive Relief, Fitisemanu v. United States, 426 F. Supp. 3d 1155 (D. Utah 2019) (No. 1:18-cv-00036-EJF), at ¶ 43.
[28] *See e.g.*, Utah Code Ann. § 17-18a-302 (stating district or county attorneys must be U.S. citizens); Utah Code Ann. § 34-30-1 (giving U.S. citizens preference for public works projects).
[29] Utah Code Ann. § 76-9-1008(1)(b).
[30] Complaint, *supra* note 27, at ¶ 75.

officer" but was barred from doing so because of his citizenship status.[31] Mr. Fitisemanu has also been discouraged from applying for federal and state jobs that require U.S. citizenship.[32] All of the Petitioners are taxpayers, yet they are "unable to meaningfully participate in the civic life of the very governments they as Americans help fund."[33]

Even if American Samoans sought to become U.S. citizens through naturalization, the process is expensive, burdensome, and time-consuming. There is also no guarantee that they would ultimately be successful. If an American Samoan attempts to become a naturalized citizen, they are generally treated the same as foreign nationals for most aspects of the naturalization process.[34] For example, despite the fact that the public education curriculum in American Samoa is taught in English and subject to U.S. educational standards, American Samoans must take and pass the U.S. Citizenship and Immigration Services' English and civics test.[35] They also must pay government fees totaling $725, in addition to other expenses associated with naturalization.[36]

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In *Fitisemanu v. United States*, before determining whether the *Insular Cases* were relevant to the question of American Samoan citizenship, the Tenth Circuit analyzed whether the Citizenship Clause itself decided the issue. Although the Tenth Circuit acknowledged that a constitutional provision may "apply by its own terms,"[37] thereby preempting the application of the *Insular* framework, the *Fitisemanu* court did not adhere to the "familiar principles of

[31] Complaint, *supra* note 27, at ¶ 59.
[32] Complaint, *supra* note 27, at ¶ 7.
[33] Complaint, *supra* note 27, at ¶ 52.
[34] Complaint, *supra* note 27, at ¶ 77
[35] Complaint, *supra* note 27, at ¶ 77(b).
[36] Complaint, *supra* note 27, at ¶ 77(e).
[37] Fitisemanu v. United States, 1 F.4th 862, 877 (10th Cir. 2021).

constitutional interpretation" which the Supreme Court has repeatedly affirmed.[38] These principles would have required a "careful examination of the textual, structural, and historical evidence. . . ."[39] Instead, the court impermissibly limited the scope of its interpretive inquiry, employing a novel plain-language standard in which the court failed to properly account for the many contemporary judicial opinions, dictionaries, maps, and censuses which indicated that territories would have been considered "in the United States" at the time the Fourteenth Amendment was written.[40] The court instead relied upon doctrine that was established forty years after the Fourteenth Amendment was written. The Tenth Circuit also failed to consider the significant influence the common law and *Dred Scott v. Sandford* had on the Framers in drafting the Citizenship Clause.[41]

The *Insular Cases* are not controlling on the question of citizenship because the Fourteenth Amendment establishes its own independent scope. "*All persons* born or naturalized *in the United States, and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside."[42] If American Samoa is within the geographic scope of "the United States" as used in the Citizenship Clause, Congress would have no power to restrict citizenship because it would be granted automatically.[43]

However, the Tenth Circuit's interpretation of "in the United States" was improperly guided by the *Insular Cases* themselves. By referring to the *Insular Cases*' distinction between incorporated and unincorporated territories, the Tenth Circuit invoked a doctrine that was

[38] Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012).
[39] *Id*.
[40] S*ee Fitisemanu*, 1 F.4th at 886–90 (Bacharach, J., dissenting).
[41] *Id.* at 895 ("The drafters of the Citizenship Clause believed that the Thirteenth Amendment had already overturned Dred Scott and re-established the natural law of citizenship.").
[42] U.S. Const. amend. XIV, § 1 (emphasis added).
[43] Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 589 n.21 (1976) (stating that the terms of certain constitutional protections could require the rights be extended to territories, thus placing them outside of Congress's control).

established decades after the Fourteenth Amendment was written, thereby undermining the purpose of this initial inquiry: to determine the geographic scope of the Citizenship Clause at the time it was written.[44]

The only *Insular Case* which involved a constitutional provision with a geographic component was *Downes v. Bidwell*, in which the Court interpreted the Uniformity Clause.[45] The Uniformity Clause states "all Duties, Imposts and Excises shall be uniform throughout the United States."[46] In a plurality opinion, the *Downes* Court concluded that, "throughout the United States," as used within the Uniformity Clause, did not include unincorporated territories.[47] However, this interpretation does not affect the Citizenship Clause analysis for several reasons. First, no opinion in *Downes* commanded a majority of the Court.[48] A majority merely concurred in the judgment that the Foraker Act, which imposed duties on imports from Puerto Rico, was constitutional.[49] Second, even if the logic of *Downes* could be extended to other constitutional provisions, the Supreme Court subsequently acknowledged its limited reach. Concurring in another *Insular Case*, Justice White stated that *Downes* was controlling "for the purposes of the [U]niformity [C]lause."[50] Additionally, in *Gonzales v. Williams*, the *Insular* Court explicitly declined to address the issue of birthright citizenship among those born in the territories, indicating that the Court did not view the issue as having been previously

[44] Boumediene v. Bush, 553 U.S. 723, 843 (2008) (Scalia, J., dissenting) ("The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people." (citing Crawford v. Washington*,* 541 U.S. 36, 54 (2004))).
[45] 182 U.S. 244, 244 (1901).
[46] U.S. Const. art. I, § 8, cl. 1.
[47] 182 U.S. at 277–78.
[48] 182 U.S. at 244 n.1. ("[I]t it is seen that there is no opinion in which a majority of the court concurred.") (as reported by LEXIS).
[49] *Downes*, 182 U.S. at 347.
[50] Dooley v. United States, 183 U.S. 151, 165 (1901) (White., J., concurring).

decided.[51] Finally, in *Dooley v. United States*, which was decided the same day as *Downes*, the Court further differentiated the Uniformity Clause from the Citizenship Clause, stating that the power to tax is firmly within Congress's domain.[52]

Instead of affording proper weight to the common law, the Tenth Circuit found the *Insular Cases*' distinction between incorporated and unincorporated territories to be instructive.[53] Although the court acknowledged the extensive historical evidence that the territories would likely have been considered a part of the United States since "Americans from the era preceding the ratification of the Fourteenth Amendment . . . harbored an expansive understanding of the geographical scope of their country," the court did not find this evidence determinative.[54] The Tenth Circuit did acknowledge the Supreme Court's ruling in *United States v. Wong Kim Ark* that the Fourteenth Amendment "affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country."[55] However, the court described *Wong Kim Ark*'s discussion of common law as "an invocation of persuasive authority rather than an incorporation of binding caselaw."[56]

The Supreme Court has cautioned that it is particularly important to consider the meaning of a constitutional provision at the time it was adopted when the provision incorporates a pre-existing common law right.[57] Nonetheless, the Tenth Circuit derided the district court for giving

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[51] 192 U.S. 1, 12 (1904) ("We are not required to discuss . . . the contention . . . that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States.").
[52] *Dooley*, 183 U.S. at 166 ("The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. . . . Thus limited, and thus only, it reaches every subject, and may be exercised at discretion." (quoting *License Tax Cases*, 72 U.S. 462, 471 (1866))).
[53] *See Fitisemanu*, 1 F.4th at 876 ("[T]he distinction between incorporated and unincorporated territories [is] firmly established in caselaw . . . ."); *contra* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 819 (2005) (stating the *Insular Cases*' distinction between incorporated and unincorporated territories was unprecedented).
[54] *Fitisemanu*, 1 F.4th at 877.
[55] *Fitsemanu*, 1 F.4th at 871 (quoting *Wong Kim Ark*, 169 U.S. 649, 693 (1898)).
[56] *Id.* at 873.
[57] *See Crawford*, 541 U.S. at 54 (interpreting the Confrontation Clause in light of the common law hearsay exceptions).

too much weight to the common law doctrine; the majority stated that common law can "shed[] light" on the meaning of the Citizenship Clause, but *Wong Kim Ark* "does not incorporate wholesale the entirety of English common law as governing precedent."[58]

However, the Tenth Circuit misunderstood the purpose served by common law in constitutional interpretation. The district court did not find the doctrine of *jus soli* (birthright citizenship) to be determinative merely because the Supreme Court said in *Wong Kim Ark* that the Citizenship Clause must be interpreted in the light of the common law.[59] The district court was heeding the Court's guidance that the Citizenship Clause must be interpreted in light of the common law because "the principles and history of [the common law] were familiarly known to the framers of the constitution. The language of the constitution . . . could not be understood without reference to the common law."[60] Therefore, as the district court properly recognized, the common law speaks to the *prima facie* issue of the geographic scope of the Citizenship Clause.[61]

Further guidance can be found in the *Slaughter-House Cases*, where the Supreme Court addressed the Citizenship Clause's purpose and broader implications only five years after the Fourteenth Amendment was ratified.[62] The Court recognized that the Citizenship Clause's main purpose was to "overturn[] the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States."[63] As Judge Bacharach stated in his *Fitisemanu* dissent, in concluding that "African Americans couldn't become citizens even if they had been born in the United States," *Dred Scott* repudiated the "common law's

[58] *Fitisemanu*, 1 F.4th at 872.
[59] Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1190–91 (D. Utah 2019).
[60] *Wong Kim Ark*, 169 U.S. at 654 (citations omitted).
[61] *Fitisemanu*, 426 F. Supp. 3d at 1191 ("American Samoa is within the dominion of the United States because it is a territory under the full sovereignty of the United States—that is, American Samoa is within the 'full possession and exercise of [the United States'] power.'" (alteration in original) (quoting *Wong Kim Ark*, 169 U.S. at 659)).
[62] 83 U.S. 36 (1872).
[63] *Id*. at 73.

recognition of birthright citizenship."[64] As the *Slaughter-House* Court explained, the Citizenship Clause was adopted to "put[] at rest" the mistaken notion that those "who had been born and resided always in the District of Columbia *or in the Territories, though within the United States*, were not citizens."[65] *Dred Scott* provides important context to the framing of the Citizenship Clause, yet the *Fitisemanu* majority failed to even mention it.[66]

In *Afroyim v. Rusk*, the Court further expounded on the significance of *Dred Scott* in relation to the Fourteenth Amendment.[67] The *Afroyim* Court explained that the Citizenship Clause ensured that African Americans' newly granted citizenship wasn't subject to the whims of subsequent Congresses that may wish to return to the status quo under *Dred Scott*.[68] To suggest that citizenship in American Samoa may only be extended by the grace of Congress would directly contradict the core purpose of the Fourteenth Amendment.[69]

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The Tenth Circuit cited Justice White's concurrence in *Downes* as evidence that the Citizenship Clause does not grant birthright citizenship to American Samoans; the court noted that Justice White "specifically mentioned citizenship as the type of constitutional right that should not be extended automatically to unincorporated territories."[70] However, Justice White's

[64] 1 F.4th at 893 (Bacharach, J., dissenting) (citing Dred Scott v. Sanford, 60 U.S. 393, 404–05 (1857)).
[65] *Slaughter-House Cases*, 83 U.S. at 72–73 (emphasis added).
[66] 1 F.4th at 864–81 (holding "that the extension of United States birthright citizenship is impracticable and anomalous" without reference to *Dred Scott*).
[67] 387 U.S. 253, 263 (1967) ("[I]t seems undeniable from the language [the Framers of the Fourteenth Amendment] used that they wanted to put citizenship beyond the power of any governmental unit to destroy.").
[68] *Id.* at 267–68 ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power.").
[69] *See, e.g.*, *Fitisemanu*, 1 F.4th at 897 (Bacharach, J., dissenting) ("The Citizenship Clause was thus designed to remove birthright citizenship from Congress's domain, confirming the abrogation of *Dred Scott* and ensuring preservation of the citizenship that freed slaves had enjoyed under the common law.").
[70] Fitisemanu v. United States, 1 F.4th 862, 869 (10th Cir. 2021) (citing Downes v. Bidwell, 182 U.S. 244, 306 (1901) (White, J., concurring)).

reasoning is appalling to modern readers and has no place in modern jurisprudence. He illustrates the problem of birthright citizenship with a hypothetical in which citizens discover "an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons."[71] A system of birthright citizenship, he argued, would "inflict grave detriment on the United States" because it would lead to "the immediate bestowal of citizenship on those absolutely unfit to receive it."[72] These racist distinctions regarding who was worthy of constitutional protection pervaded the *Insular Cases*.[73] Even the Tenth Circuit acknowledged, "not only is the purpose of the *Insular Cases* disreputable to modern eyes, so too is their reasoning."[74] Given that its roots are in white supremacy, any dicta in the *Insular Cases* regarding citizenship is unpersuasive.[75]

The doctrine established by the *Insular Cases* cannot be separated from the reality that the Supreme Court's decisions were motivated by practical and political concerns regarding the governance of foreign territories that were acquired as a result of the Spanish-American War.[76] The *Insular* Court needed to devise a system that would allow the mainland to exercise control over noncontiguous lands that were inhabited by people of different races, languages,

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[71] *Downes*, 182 U.S. at 306.
[72] *Id.*
[73] *See Downes*, 182 U.S. at 282 (majority opinion) (stating "differences of race" raise "grave questions" as to what rights will be afforded to the inhabitants of newly acquired territories); Efren Rivera Ramos, *Puerto Rico's Political Status: The Long Term Effects of American Expansionist Disclosure*, *in* The Louisiana Purchase and American Expansion, 1803-1898 163, 167 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) ("The [*Insular Cases*] were permeated by. . .a racially grounded theory of democracy that viewed it as a privilege of the 'Anglo-Saxon race' rather than as a right of those subjected to rule.").
[74] *Fitisemanu*, 1 F.4th at 870.
[75] *See, e.g.*, Gustavo A. Gelpí & Dawn Sturdevant Baum, *Manifest Destiny: A Comparison of the Constitutional Status of Indian Tribes and U.S. Overseas Territories*, 63 Fed. Law., Apr. 2016, at 38, 39–40 (stating the *Insular Cases*are "increasingly criticized by federal courts. . .as founded on racial and ethnic prejudices").
[76] *See* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 285 (2007) ("[T]he *Insular Cases* translated the salient political dispute of the times, regarding the acquisition and governance of the foreign territories acquired as a result of the Spanish-American War of 1898, into the vocabulary of the Constitution.").

religions, and legal systems.[77] These newly acquired territories differed from previous acquisitions in that, for the first time, there were almost no United States citizens residing there when the change in sovereignty took place.[78] Additionally, most of the native populations were not white.[79] Because historical experience made the label of "colonialism" anathema to Americans, "the answer to this conundrum had to be cloaked in an American constitutional mantle of facial respectability."[80] Therefore, the new legal regime established under the *Insular Cases* allowed for flexibility. As the Court stated in *Boumediene v. Bush*, the *Insular* Court adopted the doctrine of territorial incorporation in order to avoid dealing with the "uncertainty and instability" which would occur if the Constitution applied in full to all territories.[81]

The Tenth Circuit applied the *Insular* framework to a new constitutional provision in contravention of the Court's explicit warnings.[82] The Supreme Court established in *Reid v. Covert* that citizenship preempts the applicability of the *Insular Cases*.[83] *Reid* concerned whether an American civilian may be tried by a military tribunal, in contravention of Article III and the Fifth and Sixth Amendments.[84] Although the crime had taken place abroad, the Court in *Reid* stated that the *Insular Cases* were inapplicable because "the basis for governmental power is American citizenship."[85] The defendant in *Reid* was an American citizen, so she was

[77] *Id.* at 289–90 ("The de facto colonial status had to be validated by a legal regime that would de jure allow the United States to govern the new lands and their people with a free hand, untethered by the constitutional constraints that normally restrained the governmental structures of the continental United States.").
[78] *Id*. at 289.
[79] *Id.*
[80] *Id*. at 290.
[81] 553 U.S. 723, 757 (2008).
[82] *See* Reid v. Covert, 354 U.S. 1, 14 (1957) ("[N]either the [*Insular*] cases nor their reasoning should be given any further expansion.").
[83] *Id.* ("[The *Insular Cases*] involved the power of Congress to provide rules and regulations to govern temporarily [sic] territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship.").
[84] 354 U.S. at 3.
[85] *Id*. at 14.

entitled to all of the rights and liberties guaranteed by the Constitution.[86] Therefore, *Reid* stands for the proposition that, before the *Insular Cases* are even considered, it must first be established whether the affected individual is a citizen, since that question would be determinative.[87]

Additionally, just two years ago in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, the Court reaffirmed *Reid's* refusal to extend the *Insular Cases*.[88] The Court declined to apply the *Insular Cases* to the issue of whether the Appointments Clause governed the selection of the Financial Oversight and Management Board for Puerto Rico.[89] The Court described the *Insular Cases* as "much-criticized" and stated that "whatever their continued validity we will not extend [the *Insular Cases*] in these cases."[90] Citing a series of briefs and academic articles criticizing the *Insular Cases*, the Court chose to instead decide the case on alternate grounds.[91]

The Tenth Circuit justified its expansion of the *Insular* framework through a misreading of the Supreme Court's precedent. The court relied upon *Boumediene* to demonstrate the continuing vitality of the *Insular Cases*.[92] However, *Boumediene* is distinguishable. First, *Boumediene* dealt with the Suspension Clause, a constitutional provision that provides for writs of habeas corpus,[93] which, unlike the Citizenship Clause, does not define its own scope.[94] Second, the Court's ultimate conclusion in *Boumediene*–that the constitutional provision

[86] *Id*. at 5–6 ("[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.").
[87] *Id.* at 6 ("When the Government reaches out to punish a citizen who is abroad, the shield. . .the Constitution provide[s] to protect his life and liberty should not be stripped away just because he happens to be in another land.").
[88] 140 S. Ct. 1649, 1665 (2020) (citing *Reid*, 354 U.S. at 14).
[89] *Id.*
[90] *Id*. (citing *Reid*, 354 U.S. at 14).
[91] *Id.*
[92] *Fitisemanu*, 1 F.4th at 870 (citing *Boumediene*'s use of the *Insular Cases* as evidence that they remain applicable).
[93] 553 U.S. at 732.
[94] U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

at issue does apply to detainees in Guantanamo Bay–demonstrates that this Court has refined its interpretation of the *Insular Cases*.[95] In applying the *Insular* framework, the Court emphasized its limitations, namely that "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[96] The Court also noted that the Suspension Clause "must not be subject to manipulation by those whose power it is designed to restrain."[97]

The Court's characterization of the *Insular Cases* in *Boumediene* is instructive. The Court stated that the *Insular Cases* "held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace."[98] Additionally, it stated that a territory's status as "unincorporated" may not always be determinative since "over time the ties between the United States and any of its unincorporated Territories [may] strengthen in ways that are of constitutional significance."[99] The Court thereby left room for evolving understandings of the *Insular* framework and flexibility regarding its application. The Court should clarify its precedent, officially overturn the *Insular Cases*, and affirm that American Samoans are entitled to birthright citizenship.

[95] 553 U.S. at 798.
[96] *Id*. at 765.
[97] *Id.* at 765–66.
[98] *Id*. at 757.
[99] *Id*. at 758 (citation omitted).

Applicant Details

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Applicant Education

BA/BS From	**University of St. Andrews**
Date of BA/BS	**June 2014**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 24, 2020**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

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May 30, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am writing to apply for a clerkship in your chambers for the 2025 – 2026 term, or your next available term.

A resume, transcript, law school grading policy and writing sample are enclosed. Letters of recommendation from Freshfields Bruckhaus Deringer Partner Adam Siegel and Cornell Law School professors John Blume and Valerie Hans will follow.

Please do not hesitate to contact me at the above address or telephone number if you should need any additional information.

Sincerely,

Alessandra Scalise

Enclosures

Alessandra L. Scalise

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Education

Cornell Law School *Ithaca, New York* May 2020
J.D. received 2020, GPA: 3.58
Honors: *Cornell Law Review,* Senior Articles Editor; Honors Fellow, Lawyering Program; Eisenberg Research Fellow with Professor Valerie Hans; Teaching Assistant, Principles of American Legal Writing; CALI award (awarded to the student with the highest grade), Contemporary American Jury; Dean's List: Fall 2018, Fall 2019
Activities: Women's Law Coalition

University of St Andrews *St Andrews, Scotland* June 2014
Master of Arts (Hons.) International Relations.

Experience

FRESHFIELDS BRUCKHAUS DERINGER, Associate, Summer Associate *New York, NY* *October 2020 – Present*
- Prepared and participated in witness interviews, participated in witness interviews, and drafted client-facing internal investigation memoranda regarding risk exposure regarding allegations of accounting fraud for a multinational energy company and potential antitrust violations for pharmaceutical company.
- Conducted legal research and drafted client-facing memoranda relating to representation of current and former employees across multiple jurisdictions in emissions-related regulatory investigations.
- Prepared client-facing memoranda advising large technology company across matters relating to Russia and the impact of sanctions and other international responses to Russia's military actions.
- Conducted legal research and drafted portion of motion for multinational company regarding Alien Tort Statute claims.
- Recipient of 2021 Pro Bono Publico Award for outstanding service to Legal Aid and its clients.

GOOGLE, Legal Secondee *New York, NY* *April 2022 – February 2023*
- Analyzed and drafted proposed amendments for federal and state competition legislation.
- Drafted internal and external facing talking points, legislative analysis memoranda, and coordinated press strategy for client on competition litigation legislation and pending investigations across the Americas.
- Represented Google, LLC in policy consortium with social media companies.

INTERNATIONAL HUMAN RIGHTS CLINIC *Ithaca, NY* *August 2019 – May 2020*
- Supported attorneys at Cornell Law School in the representation of individuals serving death sentences in Tanzania by using international human rights law and bodies to exert pressure on domestic authorities.
- Conducted witness interviews in Tanzania and Zanzibar to assist in fact gathering.
- Drafted motion for the African Court on Human and Peoples' Rights in support of representation of clinic clients.

JUVENILE LIFE WITHOUT PAROLE CLINIC *Ithaca, NY* *January 2019 – May 2019*
- Supported attorneys at Cornell Law School and co-counsel with ongoing post-conviction litigation.
- Conducted legal research, drafted memoranda and motions, and interviewed witnesses relating to clients represented by the Cornell Juvenile Life Without Parole Clinic and the Cornell Capital Punishment: Post Conviction Litigation Clinic.

U.S. ATTORNEY'S OFFICE, CRIMINAL DIVISION, E.D.N.Y., Intern *Brooklyn, NY* *May 2018 – August 2018*
- Conducted legal research and draft memoranda regarding ongoing investigations arising out of the Public Integrity Unit.
- Drafted reply brief to habeas petition; argued detention hearing.

KOBRE & KIM, LLP, Legal Analyst *New York, NY* *February 2016 – July 2017*
- Provided factual and financial research and analysis to support attorneys throughout litigation and discovery.
- Drafted presentations and memoranda for delivery to clients and DOJ to support K&K's financial litigation practice.
- Managed workflow of team members and project deadlines as the 'Coordinating Analyst' on several cases.

SCHLAM STONE & DOLAN, Litigation Paralegal *New York, NY* *August 2014 – January 2016*
- Edited briefs, performed cite checks, drafted answers to complaints and letters to clients and opposing counsel.
- Supported attorneys with complex commercial and white-collar defense litigation case management preparations.
- Assisted in-court duties and trial prep through discovery, organizing exhibits, and attending court proceedings.

Language Skills: Italian (Professional working proficiency)
Interests: Travel, Italian cooking, Formula One racing